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No. 73-203

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
JUN 4 1974

Walter T. Zimmerman
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

MELVIN WITHROW,
Defendant-Appellant,
vs.
BOWEN WALKER,
Plaintiff-Appellee.

:
:
: Appeal from the Circuit Court,
: Gallatin County, Illinois.
:
:
:
: Honorable Don A. Foster,
: Judge Presiding.
:
:
:

PER CURIAM:

This is an appeal from an order of the circuit court of Gallatin County denying defendant's motion to quash attachment for contempt; to strike citation to discover assets; to vacate order to file transcript; and to strike cause with prejudice.

On August 21, 1961 the plaintiff, Bowen Walker, caused a justice of the peace, Grade Fields, to issue a summons commanding defendant, Melvin Withrow, to appear August 24, 1961. The sheriff personally served the defendant and the defendant appeared before Grade Fields on August 26, 1961.

The record is sketchy as to what actually transpired in this proceeding and for this reason the record as it appears on page four of the Law Docket of Grade Fields is set forth below.

"State of Illinois
Gallatin County

Bowen Walker vs. Melvin Withrow

Demand \$475.45

Summons issued on Aug. 21, 1961 and delivered to Bailey Miller, Sheriff.

JUSTICE FEES

Advance Fee \$4.00 Judgment \$1.00. Sheriff \$5.30



August 26, 1961

Summons returned showing service on Melvin Withrow, August 24, 1961, by Bailey Miller, Sheriff, by Paul D. Wood, Deputy.

The defendant appeared before this Court and informed. He agreed, he owed debt to Bowen Walker and judgment was made by the court for the amount of \$495.45 plus cost \$10.30, total \$505.75."

Our examination of this docket entry reveals that a valid judgment was not entered. Although any doubt arising from the incompleteness of the record will be resolved against appellant, (McGann v. Lurie, 15 Ill.App.2d 297, 146 N.E.2d 223), there are certain prerequisites to a valid judgment.

An order which fails to recite in whose favor and against whom it is rendered, is not a valid final judgment order. (Kaley v. Carr, 348 Ill.App. 151, 108 N.E.2d 512, foll'd, Waters v. Chicago & Eastern Illinois Railroad Co, 13 Ill.App.3d 661, 300 N.E.2d 521.) In Public Works and Buildings v. Giesecking, 108 Ill.App.2d 105, @709, 246 N.E.2d 707, this Court stated:

"The general rule is that a judgment must designate the parties for and against whom it is rendered or it will not be a valid final judgment. Kaley v. Carr, 348 Ill.App. 151, 108 N.E.2d 512, and cases cited therein. We do not condone entry of a purported judgment which does not meet that requirement; the parties are entitled to know precisely the status of the matter and where they stand, without searching the record, once the issues have been determined." (Emphasis added.)

In that case, however, it was held that the parties were not prejudiced and the matter was corrected.

In the case at bar the mere inconvenience of the parties is not the only consideration. The plaintiff, appellee, commenced this action in August of 1961 in a justice of the peace court. By a Judicial Amendment adopted at the general election of November 6, 1962, effective January 1, 1964, justice of the peace courts were abolished and their jurisdiction, judicial functions, powers and duties were transferred to the respective circuit courts on the effective date of the Article (ILL. Const. art. 6, §8). The provisions of chapter 79, justices and constables, remained in force from January 1, 1964, until April 15, 1965, when the entire chapter was repealed by House Bill No. 45. During this fourteen month period suitors and creditors were



afforded a reasonable time and opportunity to enforce their rights and remedies and to correct any deficiency in their judgments.

During this fourteen month period the plaintiff, appellee, had an ample opportunity to seek an order to file transcript in the respective circuit court. This was not filed until August 26, 1966. Furthermore, the plaintiff, appellee, refrained from additional action until March 16, 1970, more than three and one-half years later, when he filed an objection to dismissal.

The failure of the plaintiff, appellee, to act diligently in this matter and the prejudice this failure caused defendant, appellant, precludes the trial court from, at this time, correcting the patently deficient "judgment" entered on August 26, 1961.

However, assuming ad arguendo that a valid judgment was rendered in the justice of the peace court we must nevertheless reverse the holding of the circuit court due to the plaintiff's, appellee's, failure to comply with the statutory requirements, then in effect, for the execution of judgments and for the filing of transcripts. Illinois Revised Statutes 1961, chapter 79, par. 136, required as a condition precedent to the filing of a transcript in the circuit court, that execution be issued, served and returned showing that the defendant has "not sufficient personal property to satisfy the judgment and costs." There is no indication in the record that execution was issued or served by the justice of the peace court. The requirement that an execution issue within seven years (ch. 79, par. 133, Ill.Rev'd.Stat. 1961) was ignored. Illinois Revised Statutes¹⁹⁶¹, chapter 79, par. 137, required that: "Every transcript shall be certified by the justice of the peace making the same" and then enumerated the contents to be included therein. The "transcript" from the justice of the peace court included in the record was not certified as required by the preceding statute. Prior to 1965, Illinois Revised Statutes 1961, chapter 77, par. 64, provided the authority for the acceptance by the circuit court of a transcript from the justice of the peace courts. In 1965, House Bill No. 1525, repealed this provision and, presumably, the authority vested thereunder. The plaintiff, appellee, purportedly filed the "transcript" in this cause in August, 1966, after the repeal of this provision.



Although no authority was cited in the plaintiff's petition to file transcript, the circuit court ordered that said "transcript" be filed therewith. In view of the non-compliance with the aforementioned statutory requirements prescribed for the filing of transcripts from the justice of the peace courts with the circuit court we find that the circuit court was without jurisdiction to order the filing of said "transcript" and hence all action taken thereafter is now deemed void.

It follows, therefore, that the order denying defendant's, appellant's, motion to strike cause with prejudice be reversed and the cause dismissed in the Circuit Court with prejudice. Petitions, orders and other court proceedings which would prejudice defendant, and which are based on a nullity cannot stand.

Order Reversed and cause dismissed in the Circuit Court with prejudice.

CREBS, J. not participating.

PUBLISH ABSTRACT ONLY

No. 72-209

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
JUN 7 1974
Walter T. Simmons
CLERK
FIFTH DISTRICT OF ILLINOIS
APPELLATE COURT

G. P. CONSTRUCTION CO., INC.)	
	)	Appeal from the Circuit Court of Monroe
Plaintiff-Appellee,	)	County.
)	
vs.)	
)	
WALTER DIESTELHORST,)	
	)	Honorable Alvin H. Maey's,
Defendant-Appellant.	)	Judge Presiding.

PER CURIAM:

Defendant appeals from a judgment entered upon a claim of an oral contract guaranteeing 20 days work to plaintiff for the rental of a crane with an operator.

Primarily, the proof of the contract was concerned with the president and chief owner of the plaintiff conversing by telephone with defendant. The stories of the parties are sharply divergent. Defendant claims that plaintiff did not meet its burden of proof on the existence of the contract of guarantee nor on damages. The case was heard before the court without a jury, resulting in judgment for plaintiff in the amount of \$626.94.

Under the facts as revealed by the evidence, we feel that we are not in a position to substitute our judgment for that of the trial judge who saw the witnesses and is presumed to be in a superior position to weigh questions relating primarily to credibility. However, we believe the undisputed evidence discloses a lesser amount due plaintiff than that computed by the trial court.

Plaintiff's own evidence disclosed that the crane was actually used in the performance of work for the defendant a total of 13 days and during that time it was used a total of 58 hours with plaintiff furnishing the operator, and 28 hours with defendant furnishing the operator. Plaintiff's evidence was that the cost of the crane to the defendant was to be \$30 per hour when plaintiff furnished the operator and \$20 per hour when defendant furnished the operator. According to plaintiff's own evidence

it was entitled to \$2300 for the 13 days. In addition, plaintiff should have an additional \$20 per hour for 7 days at 8 hours per day for the remainder of the 20 days that defendant did not use the crane. This would make an additional \$1120 due plaintiff. Therefore, plaintiff is entitled to \$2300 plus \$1120, or a total sum of \$3420.

However, plaintiff admits defendant is entitled to credit for the sum of \$2065 already paid by defendant to plaintiff, credit in the sum of \$256.16 for repairs to the crane paid for by the defendant, and credit for the sum of \$800 received by plaintiff for the use of its crane on a job for the phone company. This makes a total of \$3121.16 that should be deducted from the \$3420 due plaintiff, leaving a balance of \$298.84 due plaintiff.

The judgment in favor of the plaintiff is modified in amount, to provide judgment for plaintiff in the amount of \$298.84.

Judgment affirmed as modified.

Crebs, J. not participating

PUBLISH ABSTRACT ONLY.

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(24540-4M-9.70) 160-o



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH, Presiding Judge

HONORABLE HAROLD F. TRAPP, Judge

HONORABLE JAMES C. CRAVEN, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 12th day
of June A. D. 1974, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12189

Agenda 74-34

COLES COUNTY NATIONAL BANK, a)	
National Banking Association,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
THE FIRST NATIONAL BANK AND TRUST	)	Macon County
COMPANY OF TUSCOLA, a National	)	69-L-1089
Banking Association,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Macon County in favor of plaintiff Coles County National Bank [Coles] against The First National Bank and Trust Company of Tuscola, the defendant, and a judgment in favor of Coles as counter-defendant against First National as counter-plaintiff. We need only consider a single issue upon this appeal--whether the trial court's ruling is supported by the manifest weight of the evidence.

Coles filed a complaint which alleged that First National had dishonored a check it had drawn in the amount of \$33,249.30.

Coles also filed amendments to its complaint alleging in substance conversion of funds by First National and prayed for punitive damages. The request for punitive damages was eventually withdrawn. First National answered the complaint and amendments by denying the material allegations found therein, and it set out several affirmative defenses. First National eventually filed a counter-claim demanding judgment in its favor for the same amount as found in Coles' amended complaint.

This litigation arose out of a secured transaction originally between one Glenn Phillips and Coles sometime in 1965. Phillips used a herd of cattle he allegedly owned as security for the promissory notes representing the loans outstanding. Coles filed financial statements in the appropriate counties as required by article 9 of the Uniform Commercial Code (Ill.Rev.Stat.1965, ch. 26, § 9-401) in order to perfect its security interest. The promissory notes in question were renewed and on the date of renewal First National purchased from Coles a portion of the loans in question. This purchase was evidenced by two participation certificates dated January 21, 1967 and March 4, 1967, respectively.

In the fall of 1967, Mr. Mills the president of Coles had a conversation with Mr. Edwards, the president of First National concerning the soundness of the Phillips' loan. Mr. Mills informed Mr. Edwards that the security for the loans was nonexistent and that Phillips' representation with reference thereto had been fraudulent. Neither bank made any investigation regarding

the actual existence of the cattle. Coles relied upon the general reputation and integrity of Mr. Phillips and in turn First National did the same.

On February 22, 1968, Coles drew a check on First National [both institutions were correspondent banks] payable to the Federal Reserve Bank of Chicago in the amount of \$33,249.30, the amount that Coles had on deposit with First National. The draft was returned by the Federal Reserve Bank marked "insufficient funds". This litigation resulted.

Mr. George Edwards was one of the organizers and president of Coles from 1960 until late 1966. He was also the president of First National during this same period. After Edwards' tenure with Coles terminated in 1966, Mr. Walter Mills became president of Coles. Mr. Edwards continued in his capacity as president of First National and was holding that position when First National entered into the participation agreement in question. It was Mr. Edwards who instructed the First National assistant cashier to debit Coles' account with First National in the amount of \$33,011.52--the amount being the principal and accrued interest to date on the participation certificates. This was done after Edwards had conferred with Mr. Mills concerning the status of Mr. Phillips' security.

Even though Mr. Phillips and Mr. Edwards had never met, Phillips had entered into several loan arrangements with Coles between 1960 and 1965. Mr. Mills in 1965, then acting in the

capacity of vice president, conferred by telephone with Mr. Edwards regarding the renewal of the Phillips' loans. Mr. Edwards was aware of the status of the loans in question. Moreover, the participation certificates in question were entered into under his auspices. The participation certificates contained the following disclaimer: "It is expressly understood that we do not make any representation, or assume any responsibility with respect to the validity of said note, or the collateral securing the same * * * ."

The matter went to trial before a jury, but on December 22, 1969 a mistrial was declared. Eventually the cause was submitted as a bench trial on the evidentiary record made at the jury trial. The trial court found that First National's actions in dishonoring Coles' check was improper; that the disclaimer aforementioned governed the relationship of the parties and that First National was bound thereby; that the Illinois Securities Act did not govern the transfer of the participation certificates as alleged by First National; that the record of the cause does not reveal that Coles was guilty of fraudulent misrepresentation; and, lastly, the record does not establish that Coles extended any warranties, expressed or implied, with regard to the participation certificates in question to First National. We have examined the record and conclude that the findings of the trial court are not against the manifest weight of the evidence and contain no errors of law.

We believe that a recitation of the evidence presented in the trial below would have little or no precedential value. Accordingly, pursuant to Supreme Court Rule 23 (Ill.Rev.Stat.1973, ch. 110A, ¶ 23), we affirm the judgment of the circuit court of Macon County.

JUDGMENT AFFIRMED.

SMITH, P.J., and TRAPP, J., concur.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 17, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED
JUN 17 1971
JOHN J. STONEZ, Clerk of Court
Appellate Court, Second District

No. 72-372

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEARL W. CIAMPA,)	
)	
Plaintiff-Appellant,	)	Appeal from the Circuit
	)	Court for the Eighteenth
v.	)	Judicial Circuit, DuPage
	)	County, Illinois.
CHARLES R. SALVAGGIONE,)	
)	
Defendant-Appellee.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The plaintiff, Pearl W. Ciampa, sued the defendant, Charles R. Salvaggione, claiming personal injuries resulting when the car in which plaintiff was a passenger was struck from the rear by defendant's vehicle. Plaintiff appeals from a judgment entered upon a jury verdict for the defendant after denial of her post-trial motions. She contends principally that the verdict was against the manifest weight of the evidence but also claims error in the admission of evidence in the trial.

The accident occurred at approximately 6:30 A.M. on January 13, 1971, on 75th Street near the intersection of Route 53 in DuPage County. Plaintiff was a passenger in a car going in a westerly direction on 75th Street being driven by Robertine Little who was not a party to the suit. Defendant was also proceeding in a westerly direction on 75th Street. Only the plaintiff and the defendant testified to the circumstances of the accident and were called on direct and adverse examination. Both parties testified that there had been a freezing rain and that the two-lane road was icy.

Plaintiff testified that there was a hill crest some 1000 feet east of the Route 53 intersection; that when Mrs. Little was over the crest of the hill she pulled off to the side of the road and stopped because a salt truck was approaching from the opposite direction; that a "split second, a second or two at the most", later defendant crashed into the rear of the Little car, just after the salt truck had passed. On cross-examination the witness testified that the Little car went 500 feet beyond the crest of the hill before the stop and collision. She did not recall making a response in a deposition in which she stated that Mrs. Little pulled off the road as soon as she came over the hill. She stated that she had not measured the distances before the deposition but had measured them before trial. Plaintiff also could not recall making differing responses on depositions as to the location of the salt truck at the time of the accident; as to the length of time that the car was stopped before the collision; and as to whether Mrs. Little gave a signal before pulling off the road. She testified that the salt truck was in its own east bound lane and would not have forced the car off the road. The impact propelled the Little car across the east bound lane of 75th Street down into a ditch heading east or southeast.

The defendant testified that he was en route to work at the Air Traffic Control Center in Aurora, Illinois, approximately 30 miles from the scene of the accident; that he had traveled the road more than 12 to 15 times prior to the accident; that on this particular day his car was four to five car lengths behind the car ahead traveling at a speed of approximately 20-25 miles per hour when the car went out of sight over a crest in the road; that when his car came over the crest, he saw the car ahead with its brake lights on, coming to a stop or stopped on the road; that he applied the brakes but was unable to stop on the icy road before

his car collided with the rear end of the Little vehicle. He denied that a salt truck was coming at the time of the accident. He estimated the crest of the incline to Route 53 was 700 feet but said that he was not a good judge of distance.

On adverse examination of the defendant, plaintiff's counsel asked defendant whether he had called in to report that he was going to be late for work. It was established that although he did not so report, defendant was to be at work at 7 o'clock and that the accident was some 30 miles from his employment. On direct examination, defendant's counsel sought to elicit testimony as to the backup procedures which would have been followed had defendant failed to arrive at work on time. Over objection, the court allowed defendant to testify that the controller on duty would continue working until relieved, or that if the traffic were slow they could work shorthanded.

The plaintiff concedes that the issues of negligence and contributory negligence in rear end collision cases, as in other negligence cases, are pre-eminently questions of fact for the jury. (Johnson v. Skau (1962), 33 Ill.App.2d 280, 285. See also Nei v. Contracting & Material Co. (1968), 93 Ill.App.2d 226, 230-231.) She argues, however, that the trial court erred in denying her post-trial motion for a judgment notwithstanding the verdict, contending that all of the evidence viewed in its aspect most favorable to the defendant, overwhelmingly shows that defendant was guilty of negligence which either caused or contributed to the injury of the plaintiff and that the plaintiff was not guilty of contributory negligence. (Pedrick v. Peoria & Eastern R.R. Co. (1967), 37 Ill. 2d 494, 510.) She argues that it would have been impossible for defendant to reach a point some 20 miles from his home in one-half hour were he traveling at 20-25 miles per hour as he testified. Further, on the basis of defendant's own testimony, since defendant

was aware of the hill from his previous experience, saw the brake light as soon as he came over the crest of the hill, and in view of the condition of the pavement, he must have been following too closely so as to cause the impact which occurred approximately 500 feet from the hill crest.

Plaintiff also argues that the accident would not have happened if defendant had maintained a proper look-out and concludes that the verdict was against the manifest weight of the evidence. However, we cannot agree with either of these contentions.

The questions of negligence and proximate cause are ordinarily questions of fact for the jury to decide; and it is the jury which weighs the contradictory evidence and inferences, judges the credibility of the witnesses and draws the ultimate conclusion as to the facts under the court's instructions. (Paul Harris Furniture Co. v. Morse (1956), 10 Ill.2d 28, 42-43.) Issues of negligence and contributory negligence may not be decided as a matter of law unless all reasonable minds would conclude that the conduct was contrary to rational standards applicable to persons in similar situations. (Grady v. Pike (1964), 50 Ill.App.2d 366, 369. See also Welsh v. Pritchett (1963), 38 Ill.App.2d 478, 483.) Measured by these standards the court properly refused to enter judgment N.O.V. We also conclude that an opposite conclusion to that reached by the jury is not clearly evident and the verdict is therefore not contrary to the manifest weight of the evidence.

The jury could well have found that defendant was in a helpless condition as he came over the crest of the hill, and did not act negligently. (See Palmer v. Poynter (1960), 24 Ill.App.2d 68, 72.) Or the jury could reasonably have concluded from the evidence that the Little car was completely stopped in the road and that under such circumstances the accident resulted from the treacherous

road conditions and was unavoidable. (See Johanneson v. Ring (1967), 82 Ill.App.2d 340, 346; Ferdinand v. Lindgren (1961), 32 Ill.App.2d 133, 138.) Or that the negligence of Mrs. Little, a non-party, was the sole proximate cause of the collision.

In this regard, the jury was properly instructed, (I.P.I. 2d Ed, sec. 12.04) that if the defendant's negligence was the proximate cause of plaintiff's injuries, it would be no defense that some third person may also have been to blame; but that if the sole proximate cause of the injury was the conduct of some person other than the defendant, then the verdict should be for the defendant.

The cases cited by the plaintiff to support her contention that the verdict was against the manifest weight of the evidence (Glaze v. Owens (1968), 104 Ill.App.2d 172; Houchins v. Cocci (1963), 43 Ill.App.2d 433) are clearly distinguishable on their facts. We also find unpersuasive plaintiff's attempts to distinguish Ferdinand v. Lindgren, 32 Ill.App.2d 133.

Plaintiff's final contention that the defendant's testimony relative to backup procedure in the event he did not get to work on time was speculative and an improper attempt to testify as to custom or usage without a proper foundation, is not a basis for reversal. The plaintiff introduced the issue in the adverse examination of the defendant for the ostensible purpose of leading the jury to infer that defendant was hurrying to get to work on time and was thus driving faster than he testified. Under these circumstances the inquiry made by the defendant in rebuttal would appear to be relevant. (Werdell v. Turzynski (1970), 128 Ill.App.2d 139, 151.) But in any event the introduction of the evidence did not harm plaintiff to a degree which would require reversal upon consideration of the whole record since showing backup procedures which would be followed if defendant were late to work

does not necessarily establish that defendant was not in a hurry.
See Elliston v. Hunsinger (1972), 8 Ill.App.3d 1068, 1069-70.

The verdict of the jury is not against the manifest weight of the evidence and on the whole record the court properly denied plaintiff's post-trial motions. We therefore affirm the judgment.

Affirmed.

GUILD, J. and RECHENMACHER, J. concur.

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20 I.A. 70

73-114

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable L.L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 6, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

No. 73-114

FILED

JUN 6 - 1974

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court of the Seventeenth
) Judicial Circuit,
SHANNON WEST,) Winnebago County,
) Illinois.
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant appeals from an order which denied his petition for relief under the Post-Conviction Hearing Act (Ill.Rev.Stat. 1969, ch. 38, par. 122-1, et seq.) after an evidentiary hearing. He contends that the court accepted his plea of guilty to the offense of armed robbery without establishing on the record that the plea was voluntarily and understandingly made.

The trial judge before accepting the plea was advised by the State's Attorney in the presence of defendant and his public defender that there had been no plea negotiation agreement nor any promises made with the one exception that the State had agreed to dismiss two additional armed robbery indictments. The court inquired of the defendant whether he understood that and the defendant replied "Yes". The court then said to defendant, "As I understand it, you want to enter a plea of guilty to this indictment", and the defendant answered "Yes".

The court then stated what the indictment alleged and advised defendant that he had a right to trial by a jury, to hear witnesses who would testify in his presence, the right to put on a defense, and the right to have a jury pass upon his guilt or innocence; or if he waived a jury the matter would be left up to the judge alone. Defendant was then advised by the court of the minimum and maximum sentence. Again defendant was asked whether, knowing that, he still wanted to plead guilty, to which the defendant said "Yes". The court then accepted the plea.

Immediately following this, the court admonished the co-defendant Hunter. The State's Attorney gave a full statement of the facts, including defendant's admission to an investigating officer of his participation in the robbery. The court then asked defendant whether he agreed with the testimony which the State had said they would produce and defendant responded affirmatively.

The post-conviction petition essentially alleged that defendant was not fully advised of his constitutional rights and the consequences of his plea; that the court did not ascertain that the plea was free of coercion or promises; and that defendant's attorney had promised that the defendant would receive the same sentence as his co-defendant Hunter, whereas defendant was in fact sentenced to a prison term of 5-15 years, while Hunter was sentenced to a term of 3-10 years.

Both defendant and the public defender testified at the evidentiary hearing. Defendant testified to the details of the alleged promise and agreement but claimed that he had never been present when any conversation took place between the public defender and the State's Attorney. The public defender denied defendant's allegations of a promise of the same sentence as that received by the co-defendant. He also stated that he had discussed the various points of the charge and the consequences of the plea

prior to the change of plea proceedings, and that in his view, defendant understood very well the legal points involved in the proceedings against him.

The record of the post-conviction hearing fails to substantiate defendant's allegation that he pleaded guilty on the basis of an unfulfilled promise. The court was fully justified in resolving the conflicting testimony against defendant by giving credence to the testimony of the public defender that the alleged promise was not in fact made. (People v. Gibson (1969), 42 Ill. 2d 519, 524.) His determination of the facts is not manifestly erroneous and thus will not be disturbed on review. People v. Watson (1972), 50 Ill.2d 234, 236; People v. Logue (1970), 45 Ill.2d 170, 174.

We also conclude that the admonishments were in substantial compliance with Supreme Court Rule 402(Ill.Rev.Stat. 1971, ch. 110A, par. 402). (See People v. Compton (1973), 16 Ill.App.3d 196 Abst.) In any event, the voluntary and understanding nature of the plea is apparent from the whole record and the failure of the court to inquire specifically in so many words whether the plea was voluntary does not elevate the issue to a constitutional level. People v. Reeves (1971), 50 Ill.2d 28, 29-30; People v. Arndt (1971), 49 Ill.2d 530, 533-534; People v. Mendoza (1971), 48 Ill.2d 371, 374.

The trial court's denial of the petition for post-conviction relief is therefore affirmed.

Affirmed.

GUILD, J. and RECHENMACHER, J. concur.

No. 73-406

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
MAY 27 1974

Walter T. Zimmerman
FIFTH DISTRICT OF ILLINOIS
APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Randolph County.
vs.)	
)	
LEVON KIRKLAND a/k/a VERNON	)	Honorable Carl H. Becker and
McKINNEY,	)	Honorable Joseph F. Cunningham,
	)	Judges Presiding.
Defendant-Appellant.)	

PER CURIAM:

Appellant was convicted of forgery in Randolph County upon his plea of guilty. He was granted a conditional discharge. Subsequently a petition was filed to revoke the conditional discharge, charging deceptive practice and forgery. At the same time a burglary charge was filed. A hearing was held at which it was determined that appellant had violated his conditional discharge. After a pre-sentence report and hearing, appellant was sentenced to from two to six years in the penitentiary. From this determination he appeals. The State Appellate Defender for the Fifth District, appointed as counsel on appeal, has filed a motion to withdraw as counsel, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 493. A copy of the motion was properly served on appellant. We have carefully considered his pro se memorandum in response to the motion, and we find that no issues of substantive merit have been raised. We have viewed the record and find that the hearing on the petition to revoke conditional discharge was properly conducted and that there was ample evidence for the court's conclusion that violations had occurred. In addition we find that appellant's prior record and violation of previous probation justified the sentence of from two to six years. Accordingly we grant counsel's motion to withdraw and order that the judgment of the circuit court of Randolph County be affirmed.

Motion granted; Judgment affirmed.

Publish Abstract Only.

Justice Carter not participating.

PEOPLE OF THE STATE OF ILLINOIS, )	)	Appeal from the Circuit Court of Clinton
Plaintiff-Appellee, )	)	County.
vs.))	
LOUIS ALBERS, )	)	Honorable Arthur G. Henken,
Defendant-Appellant. )	)	Presiding Judge.

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Defendant Louis Albers appeals from his convictions upon pleas of guilty to three counts of burglary and one count of illegal possession of firearms.

Defendant first contends that the trial court failed to properly admonish the defendant that felony prosecution is by indictment only unless waived as required by Supreme Court Rule 401(b)(3). The record does not support this contention. During defendant's arraignment, the following transpired:

COURT: Sometimes it is hard to understand your right to preliminary hearing. Have the record show that he understands his right to preliminary hearing and he is waiving it and reducing his waiver to writing. According to this, you would be bound over to the grand jury. Now, we will ask you if you wish to exercise your right to be indicted. You wish to have that or waive that right?

A. Waive it.

COURT: I will ask you, then, to fill out this form for our record that you wish to waive it. As I pointed out to your brother, there are three ways to proceed, by complaint, information or by indictment. If you waive this now, you will be waiving your right to be charged by the grand jury. We will proceed on the complaint unless the State has an objection. If that is what you want to do. Has the State any objections to proceeding on the complaint in three counts?

STATE: No, Your Honor.

COURT: You are twenty-two.

A. Yes, Your Honor.

COURT: It says your age is twenty-two. It says you know you have a right to answer for the offense charged against you on an indictment by the grand jury. In other words, if you want to exercise that right, not to proceed on this complaint, it says you know the consequences. You understand if you were found guilty that you know the consequences. In other words, you understand all the possible penalties on these three

charges. It says you are fully informed of your legal and constitutional rights and you want to waive appearance before the grand jury. That is what it says in effect. Do you want to read that? If that is your intention to waive that, we will want you to sign it. Let the record show that he signs that in open court. If you have any questions on any of these things, we want you to ask now.

A. I don't."

Defendant also contends that the court failed to comply with Supreme Court Rule 402(a)(3) and (a)(4).

The court in admonishing the defendant referred to what might happen after a finding of guilty at a jury or bench trial, to the defendant's right to a jury or bench trial and to his right to confront witnesses.

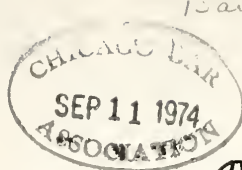
Under the rationale of People v. Mendoza, 48 Ill.2d 371, this contention is also without merit.

Judgment affirmed.

CONCUR:

Carter, Crebs, JJ.

PUBLISH ABSTRACT ONLY.



1 20 I.A. 157

No. 59003

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE
WILLIE BARRETT,	)	LAWRENCE I. GENESEN,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM:

Willie Barrett, defendant, was found guilty after a bench trial of the offense of theft, in violation of section 16-1(a) (1) of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, par.16-1(a) (1).) He was sentenced to a term of five months in the House of Correction. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Cleveland Barnett, a Chicago police officer, testified that at about noon on December 15, 1972, he observed Willie Barrett and Anthony Colson coming out of the gangway of a building at 5046 West Washington Street, Chicago, Illinois. They were carrying two television sets and various other items wrapped in a blanket. One of the television sets was a Sears color model, with a mark on it as though it had been repaired. Defendant stated that the television sets belonged to him. Defendant was placed under arrest. The Sears television set was taken into police custody.

Louis Stubblefield testified that on December 15, 1972, he left his apartment at 5046 West Washington Street, Chicago, at 6:00 a.m. When he returned home at 4:00 p.m., he observed that his apartment had been broken into and his Sears 12-inch color television set, which had a scar on the side where it had been repaired, was missing. After notifying the police, he proceeded to the police garage, where he recovered his Sears color television set.

Defendant's only contention on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the evidence failed to prove that the television set which

defendant had in his possession was the same television set that was missing from the complainant's home. Defendant was charged with theft in violation of section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch.38,par.16-1(a)(1).) Under this section, ownership is an essential element which must be alleged and proved. People v. Thomas (1972), 9 Ill.App.3d 384, 292 N.E.2d 153; People v. Roach (1971), 1 Ill.App.3d 876, 275 N.E.2d 309.

The complaint alleges that the defendant knowingly obtained unauthorized control over a Sears color television set, the property of Louis Stubblefield. At trial, Officer Barnett testified that at approximately noon on December 15, 1972, he observed the defendant and a second man come out of the gangway of a building. The men were carrying a Sears color television set with a mark on it as if it had been repaired. Defendant and his companion were placed under arrest and the television set was taken into custody. Louis Stubblefield testified that at approximately 6:00 a.m. on December 15, 1972, he left his apartment. In his apartment at that time was a Sears 12-inch color television set, with a scar on the side where it had been repaired. Stubblefield testified that when he returned home at 4:00 p.m. he found that his apartment had been broken into and his Sears color television set had been stolen. Later that evening he went to the Chicago police garage where he recovered his television set. The only reasonable conclusion to be drawn from this testimony was that the television set defendant was seen carrying belonged to Stubblefield. In a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to leave a reasonable doubt of the defendant's guilt will the finding of the trial court be disturbed. (People v. Hampton (1969), 44 Ill.2d 41, 253 N.E.2d 385.) When considered as a whole, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE MEJDA did not participate.

59035 and 59116*

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
LESTER LEWIS and CHARLES SMITH,	)	HONORABLE
	)	CHESTER J. STRZALKA,
Defendants-Appellants.)	)	PRESIDING.

PER CURIAM** (FIFTH DIVISION, FIRST DISTRICT):

After a bench trial, Lester Lewis was found guilty of two separate charges of possession of a motor vehicle with a falsified manufacturer's identification number and two separate charges of theft; Charles Smith was found guilty of one charge of possession of a motor vehicle with an altered manufacturer's identification number. Lewis was sentenced to a term of six months in the House of Correction on each charge, the sentences to run concurrently, and Smith was sentenced to a term of 30 days in the House of Correction. On appeal both defendants argue that the evidence was insufficient to establish their guilt on each charge beyond a reasonable doubt. In addition, Smith argues that his sentence is excessive and should be reduced.

At the motion to suppress and at trial the following evidence was adduced: George Henderson testified, as a witness for the State, that on August 15, 1972, he went to 1403 South Komensky because a friend of his told him that he could buy a cheap motorcycle. There he met both defendants. Smith offered to sell him a brand new 450 motorcycle for \$200. Smith gave Henderson a card with his name and address and told him to come there the next day. Henderson called the police and told them what had occurred.

* These appellate court docket numbers were consolidated for review on appeal.

** Sullivan, P.J., Drucker, J., and Lorenz, J., participating.

Chicago Police Officer Homewood testified as a witness for the State that on August 16, 1972, he went to 3916 West Grenshaw, Chicago, Illinois, with George Henderson. Homewood remained outside while Henderson entered the premises. Shortly thereafter Henderson and Smith came out of the building and were looking at two Honda motorcycles parked at that address. Homewood examined the motorcycles and found that the V.I.N. numbers (vehicle identification number) on both motorcycles were identical. Smith was placed under arrest.

Chicago Police Investigator Richard Inberg testified as a witness for the State that on August 16, 1972, he proceeded to 1403 South Komensky to execute a search warrant for the basement apartment of Lewis. Lewis admitted him and was given a copy of the search warrant. A search of the apartment revealed parts from various motorcycles. A frame of a motorcycle with the serial numbers filed down was taken to the police pound where the area around the serial numbers was sanded down and the true V.I.N. number appeared. The V.I.N. number was 450411457. The number was run through the police computer and found to refer to a motorcycle stolen from Robert Ranella. An engine from a CB 500 was also confiscated from Lewis' apartment, bearing serial number 2009133. The engine was found to have been stolen from Edward Hoppe. Lewis was placed under arrest and was given his constitutional Miranda warnings. Lewis was then asked if any of the motorcycle parts was stolen, and he replied, "Just about half of them are."

Edward F. Hoppe testified, as a witness for the State, that on June 3, 1972, he bought a CB 500, four-cylinder motorcycle. On approximately June 10, 1972, his cycle was stolen from 1700 North Clark, Chicago, Illinois.

Robert Ranella testified, as a witness for the State, that

on April 10, 1972, he purchased a Honda motorcycle. On May 5, 1972, his motorcycle was stolen from the University of Illinois, Circle Campus. The motorcycle was a CB 450 having V.I.N. number CB 4504114578.

Lewis testified on his own behalf that he works on motorcycles as a hobby. One of his customers had brought in an engine which needed work, bearing V.I.N. number CB 20019133. Lewis admitted that frame V.I.N. number CB 540110578 was also found in his apartment. He did not recall how it came to be there; different people would bring various parts of motorcycles for him to paint or do motor work on them. He denied that he ever told police officers that half the items in his apartment were stolen.

Charles Smith testified on his own behalf that on August 16, 1972, Henderson came to his home looking for Leon Smith (no relation to defendant). Leon Smith asked him to show Henderson the motorcycles parked by the curb. Charles Smith testified that as he was showing Henderson a bike belonging to Leon Smith, he was placed under arrest.

Opinion

Lewis' first argument is that he was not proven guilty beyond a reasonable doubt of either charge of possession of a motor vehicle bearing a falsified manufacturer's identification number because there was no evidence introduced that he possessed either of the motorcycles named in the complaints. The People in their brief concede that there was no evidence introduced that Lewis possessed the motorcycles charged in the complaints. After a review of the record, we concur that there is no evidence that he possessed the motorcycles named in the complaints and, therefore, reverse the aforesaid convictions.

Lewis also argues that the State failed to prove his guilt beyond a reasonable doubt on the charge of the theft of Edward .

Hoppe's motorcycle engine because the evidence was insufficient to show that the engine found in Lewis' apartment was the engine from the motorcycle stolen from Hoppe. At trial Edward Hoppe testified that he owned a CB 500 motorcycle which was stolen from him in June 1973. Inberg testified that he recovered a CB 500 motorcycle engine from Lewis' apartment, bearing serial number 2009133, and that after running the serial number through the police computer, it was discovered that the motorcycle engine had been stolen from Edward Hoppe. At trial Lewis did not object to this testimony. He now urges that Inberg's testimony that the engine belonged to Hoppe was hearsay and should not be considered. Even if we were to accept this argument, it is a well established rule that where hearsay testimony is admitted into evidence without objection, it may properly be considered and will be given its natural probative effect. Timely objections to hearsay statements must be made at trial and cannot be raised for the first time on appeal. (People v. Riles, 10 Ill. App.3d 772, 295 N.E.2d 234; People v. Davis, 126 Ill. App.2d 114, 261 N.E.2d 428.) Here the testimony, when viewed as a whole, was sufficient to establish defendant's guilt beyond a reasonable doubt on the charge of theft of the motorcycle engine belonging to Edward Hoppe.

Lewis next argues that the evidence was insufficient to establish his guilt on the charge of theft of the motorcycle frame belonging to Robert Ranella because there was no evidence that the frame recovered from his apartment was the same frame that was stolen from Ranella. At trial Ranella testified that he was the owner of a CB 450 motorcycle with V.I.N. number 4504114578 which was stolen on May 5, 1972. Inberg testified that on August 16, 1972, he recovered a motorcycle frame from Lewis' apartment for a CB 450 motorcycle bearing V.I.N. number 450411457. Inberg ran this number through the police computer

and found that the motorcycle had been stolen from Ranella. Lewis now urges that the variance of one digit between the testimony of Inberg and Ranella is fatal. Inberg's failure to state the final digit of the V.I.N. number was at best a technical oversight. No objection was raised to this variance in the trial court, and the defendant has not in any way been prejudiced. Under the facts of this case we find that defendant's guilt on the charge of theft of the motorcycle frame belonging to Robert Ranella was established beyond a reasonable doubt.

Smith argues that the evidence was insufficient to establish his guilt beyond a reasonable doubt. Smith was charged with possession of a motor vehicle with an altered V.I.N. number in that he "possessed a motor vehicle to wit Honda motorcycle bearing license number 19104 Ill. 72 with the manufacturer's identification number falsified." At trial the only evidence pertaining to defendant's possession of a motorcycle was that he offered to sell Henderson a motorcycle and showed him two Honda motorcycles parked in front of his home bearing the same V.I.N. number. At no time during trial was either motorcycle described in more detail nor was the license number of either vehicle ever stated. On the charge of possession of a motorcycle bearing a falsified manufacturer's identification number, the identity of the vehicle is an essential element which must be alleged in the complaint and proven at trial. (People v. Mosby, 25 Ill.2d 400, 185 N.E.2d 152; People v. Smith, (First Dist. No. 58822) ____ Ill. App.3d ____, ____ N.E.2d ____.) Here the evidence was totally insufficient to establish that Smith at any time possessed the vehicle stated in the complaint. Smith's conviction must therefore be reversed.

Because of the conclusion we have reached as to Smith's first point it is not necessary for us to consider his argument

that his sentence is excessive and should be reduced.

The convictions of Lewis for possession of two motor vehicles bearing falsified identification numbers are reversed, and the convictions of Lewis on two charges of theft are affirmed. The conviction of Charles Smith for possession of a motor vehicle with a falsified manufacturer's identification number is reversed.

AFFIRMED IN PART;
REVERSED IN PART.

Abstract only.

72-183

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable L. L. RECHENMACHER, Acting Presiding Justice
Honorable WILLIAM R. NASH, Justice
Honorable ROBERT E. HUNT, Justice
LOREN J. STROTZ , Clerk Pro Tem
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
June 18, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

JUN 18 1971

CLERK J. SROGIZ, Clerk pro tem
Appellate Court, 2nd District

BURTON H. KLEINMAN,)	
)	
Plaintiff, Cross - Defendant,)	
Appellee and Cross-Appellant,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the 19th Judicial
SHIRLEY KLEINMAN,	)	Circuit, Lake County,
	)	Illinois.
Defendant, Cross-Plaintiff,)	
Appellant and Cross-Appellee.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

This appeal by the defendant (wife) and cross-appeal by the plaintiff, (husband) arises out of a divorce action by the husband filed in September, 1969 charging mental cruelty and the wife's counterclaim based on the same ground.

The parties were married in September, 1950 and lived together until September, 1967 when the husband left the marital home and purchased another residence nearby. One daughter, Kim, 15 years old when the suit was filed, was living with the husband and another daughter, Lauri, 6 years old, resided with the wife.

There were numerous petitions filed by the husband and orders entered from time to time included orders enjoining the wife (1) from annoying and embarrassing the husband, and fixing his right to visit Lauri, (2) from making certain threats, and (3) from causing Lauri to attend any religious school other than that of the Unitarian Church.

In July, 1970, ten months after the suit was filed, the case was set for trial on January 19, 1971 upon the husband's motion. The wife's attorneys on January 12 requested and received leave to withdraw.¹ The trial date was reset on her motion for February 24. On that date her present counsel appeared in her behalf. New trial dates were set from time to time thereafter due to her attorney's illness until his withdrawal as her counsel on April 26 due to his physical and mental condition because of recent surgery. On April 29, 1971 (more than 19 months after the suit was filed) Judge John J. Kaufman entered an order, on motion of counsel for the husband, that the case is "finally set for trial on May 25" and that "no additional continuances will be granted". On May 14 the wife informed Judge Kaufman by letter that she had conferred with attorney Eva Schwartzman and had arranged an appointment with her.

On May 25 Judge Kaufman assigned the case to Judge Geiger for trial. The wife appeared with Mrs. Schwartzman (who was given leave to file her appearance) and requested a continuance for the reason that her new counsel was unprepared to go to trial, having been retained only "4 days prior thereto". After hearing argument, and reviewing the record and the order of April 29, Judge Geiger denied the request.²

Thereupon the wife and her counsel refused to proceed to trial and announced they were leaving the court room. After being admonished by the court that the trial would proceed, they both departed.

The trial court then heard testimony of the husband in support of his complaint. He related his wife's conduct and its effect upon him, his financial means, and that he had been paying her about \$9000 a year.

The court also heard corroborating testimony of one of his employees. On June 1, 1971 the court entered a decree granting the husband a divorce on his complaint, dismissing the wife's counter-claim, and leaving custody of Kim with the husband, custody of Lauri with the wife, providing for visitation, ordering payment of \$25 weekly to the wife for Lauri's support and making other provision regarding real and personal property.

The wife filed notice of appeal from that decree and filed her motion for alimony, attorney's fees and costs of appeal, to vacate the decree, and for a new trial. The trial court on June 21 granted leave to withdraw her notice of appeal and ^{granted} the motion to vacate the decree only as to alimony, child support, attorney's fees and visitation (but not as to the divorce) and set those issues for hearing.³

Early in January, 1972 the trial court conducted extensive hearings for 3 days and heard testimony of both parties and of their witnesses. The husband is self employed as a real estate developer and has a networth of about \$650,000 including his one-half interest as a joint tenant in the marital property in which the wife and Lauri reside. That property is not mortgaged, is valued at \$55,000 to \$60,000 and real estate taxes thereon amount to about \$1565. His income tax returns for 1970 disclose an adjusted gross income of about \$28,000, after allowance for depreciation, etc.

On February 2, 1972 the trial court entered its order amending the decree of divorce which, insofar as material here, denied the request of the wife's counsel for an allowance of attorney's fees, ⁴ awarded periodic alimony of \$1000 per month to the wife, custody of Lauri to the wife with child support payments of \$35 per week, custody of Kim to the husband, and directed that title to the marital home remain in joint tenancy (with

real estate taxes to be paid by the husband) and to be occupied by the wife and Lauri until Lauri left home, then to be sold with the net proceeds divided equally between the husband and wife.

The wife contends that the trial court's denial on May 25, 1971 of the motion for continuance was an abuse of discretion. Reecy v. Reecy (1971), 132 Ill. App. 2d 1024, cited by her, does not lend support to her argument. Indeed, it emphasizes that granting or denying a motion for continuance is within the sound discretion of the trial court, the exercise of which will not be interfered with unless abused. (pp. 1026-1027). In that case the court observed that the record revealed that "no delays (were) brought about by the" movant. In the case at bar the matter had been pending for more than 20 months; it had been set for trial 9 times, and in almost every instance was reset at the wife's request for one reason or another. In Coleman v. Toohey (1964), 48 Ill. App. 2d 75, 80-81, wherein a similar situation arose, the court in affirming the trial court's denial of a continuance, and proceeding to a decree, said:

"We cannot say that this determination by the court constituted abuse of its discretion. Absent such abuse, we will not intervene in the trial court's discretionary control over trial delays. This principle has long been the law in Illinois, and its importance has not been lessened through the years, but rather magnified as the trial courts have come to face dockets of overwhelming proportions. (Citations.) There must be a limit beyond which the court should not go in catering to the convenience of either litigant or counsel. We believe that line to have been properly drawn in this case."

In the case at bar, the trial court did not abuse its discretion in denying the motion of the wife and her counsel for a further continuance.

Next, the wife contends that the trial court should have awarded her a portion of the husband's real or personal estate as alimony in gross,

rather than the periodic alimony awarded her by the decree, and that the court erred in not doing so. The husband, on the other hand, argues that the trial court's decision to award periodic alimony was proper in this case, but contends in his cross-appeal that the amount awarded and the requirement that he pay real estate taxes on the marital home constitute error.

It is conceded that we need not be concerned with any special equities under Section 17 of the Divorce Act (Ill. Rev. Stat. 1971, ch. 40, par. 18). The wife argues instead that the trial court should have awarded her alimony in gross out of the husband's assets rather than alimony in installments, and that its failure to do so was reversible error.

Under Section 18 of the Divorce Act (Ill. Rev. Stat. 1971, ch. 40, par. 19) the trial court has broad discretion to award alimony after carefully weighing the needs of the wife and the husband's ability to pay. (Byerly v. Byerly (1936), 363 Ill. 517, 525-526; Honey v. Honey (1970), 120 Ill. App. 2d 102, 105.) We are not persuaded by the husband's argument concerning cash flow because it could be applied to justify an award of alimony in gross. In any event, the trial court gave careful attention to all the factors to be considered and we are unable to say that the court abused its discretion in its award of alimony to the wife or in requiring the husband to pay the real estate taxes on the marital home.

The trial court's denial of an allowance of attorney's fees to the wife's attorney was based on a thorough consideration of the relevant facts. This allowance is a discretionary matter. The trial court found that the amount claimed was due largely to the wife's actions (and not to the husband's actions or the complexity of the suit). The wife had an

interest valued by the court at about \$8500 in the estate of a deceased son, some securities given to her by her father, \$2000 in a savings account and her one-half interest in the marital home. Allowance of attorney's fees rests in the sound discretion of the court and it does not appear from the record that the trial court abused its discretion. Landrey v. Landrey (1957), 13 Ill. App. 2d 202, 207; Berg v. Berg (1967), 85 Ill. App. 2d 98, 101.

We finally consider the husband's contention in his cross-appeal that the trial court erred in directing that the marital home continue in joint tenancy while possessed and occupied by the wife and their minor daughter, Lauri. He argues that the court should have directed a change from joint tenancy to tenancy in common. Had that been done, the wife and their daughter could have been effectively deprived of the use of a home while Lauri was growing up by the husband's death or the possible alienation of his interest and by a partition suit.

We cannot say that the trial court erred in any particular and the judgment of the circuit court of Lake County is therefore affirmed.

Judgment affirmed.

HUNT and NASH, JJ., concur.

FOOTNOTES

- 1 The record discloses that this withdrawal as her counsel resulted from her refusal to accept a settlement of this litigation which counsel had negotiated and recommended, and her desire to contest the husband's divorce proceeding.
- 2 Mrs. Schwartzman also presented the testimony of one of the wife's original counsel for the purpose of correcting an erroneous impression given by the finding of an order on April 29, that 3 of the wife's attorneys or firms had withdrawn their appearances due to her refusal to follow their recommendation, testifying in effect that they were all co-counsel and together recommended the settlement which the wife rejected.
- 3 On July 21 the wife filed notice of appeal from that order. We dismissed that appeal pursuant to Supreme Court Rule 304 (a) (Ill. Rev. Stat. 1971, ch. 110A, par. 304 (a)). Mr. Holt replaced Mrs. Schwartzman as the wife's attorney, and other proceedings occurred thereafter in the trial court (including the filing and denial of the wife's petition for change of venue) which do not require further mention.
- 4 Mr. Holt requested an allowance of \$6000 for attorney's fees.

No. 73-293

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILE
JUN 26 1974FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

ALTON BANKING & TRUST CO.,)	
Plaintiff-Appellee,)	Appeal from the Circuit Court of
vs.)	Madison County.
FRANK V. ROMANO, et al,)	
Defendant-Appellant.)	Honorable Andreas A. Matoesian,
	Presiding Judge.

PER CURIAM:

Defendant Frank Romano appeals from a judgment of the circuit court of Madison County in favor of plaintiff in the amount of \$893.88 plus \$250 attorney's fee.

Plaintiff filed a complaint against the defendants, Frank and Shirley Romano asking damages in the amount of \$893.88 plus \$250 attorney's fee, alleging that it was the owner of a retail installment contract which was attached to and made a part of the complaint.

Appellant filed a third party complaint against Shirley Romano alleging that he denied there was any amount due on the contract, but that if there was, Shirley Romano was obliged to indemnify him under the terms of a divorce decree. Appellant also filed a motion to dismiss plaintiff's complaint.

The report of proceedings consists of two typewritten pages which indicate that the only evidence before the trial court was testimony of the vice president in charge of retail installment contracts, that the contract was purchased by plaintiff from Auto Center City, Woodriver, Illinois, that the car was repossessed from appellant's wife and that there was a deficiency of \$893.88, after the sale. The record further recites that after the testimony of this witness, the plaintiff rested. Defendant then made a motion for a directed verdict on the ground that there was no proof that appellant executed the instrument in question. The record also reflects that other grounds were urged for the directed verdict, but they are not contained in the record.

Appellant contends that plaintiff did not prove that the defendant is the person who executed the instrument and that there was a total failure of evidence to support

the award of attorney's fee. He contends therefore that this case should be reversed outright.

Appellee contends that appellant did not raise the question of the sufficiency of the evidence to support the award of the attorney's fee and is therefore precluded from raising that question before this court. He also contends that the allegation of the execution of any written instrument is admitted unless denied under oath, citing Ill. Rev. Stat. (1971) ch. 110, par. 35(2).

With reference to this latter point, appellant claims he did not have an opportunity to deny under oath the execution of the instrument because the case was tried over his objection while his motion was still pending and therefore before he answered.

The evidence heard before the trial court was not preserved either by the use of a court reporter or tape.

Although this question was not raised by either party, we note that there is no proof that plaintiff has complied with the requirements of Article 9 of the Uniform Commercial Code as required by Ill. Rev. Stat., ch. 121-1/2, par. 580. Also, there is no proof of the reasonableness of the attorney's fee awarded.

Because the record before us is so inadequate, we reverse this case and remand for a new trial on all of the issues. 5B C.J.S., p. 505, par. 1946.

Crebs, J., did not participate.

PUBLISH ABSTRACT ONLY.



5-28-74

3D

1 201A.300

NO. 56612

KATHLEEN LEARNER and
SAMUEL LEARNER,

Plaintiffs-Appellants,

vs.

JUN INOUE,

Defendant-Appellee.

) APPEAL FROM
) CIRCUIT COURT
) COOK COUNTY
)
)
)
) HONORABLE
) DAVID A. CANEL,
) PRESIDING.
)

PER CURIAM:

Plaintiffs Kathleen Learner and Samuel Learner appeal from an order entered August 13, 1971 that denied their motion to vacate dismissal of their suit because they failed to comply with Supreme Court Rules 218 and 219(c), Ill. Rev. Stat. 1971, ch. 110A, §§218, 219(c). On appeal, they argue that the dismissal of their suit because they failed to attend a pre-trial conference was an abuse of discretion and denied them fundamental fairness.

On May 21, 1968, plaintiffs sued Jun Inouye, a dentist, alleging negligence in dental treatment he administered to Kathleen Learner. Defendant answered the complaint, denying all negligence. On May 25, 1970, the trial court ordered a pre-trial conference for July 23, 1970. Both parties attended the conference; however, no settlement was reached. On June 3, 1971, the trial court ordered another pre-trial conference for July 15, 1971, at 4:00 P.M. This order was served upon plaintiffs' attorney on June 3, 1971. Neither plaintiffs nor their attorney attended the pre-trial conference and the cause was dismissed for " * * noncompliance with Supreme Court Rules 218 and 219(c) and the order of this Court entered on June 3, 1971." On August 13, 1971, plaintiffs filed a motion to vacate the dismissal. The affidavit in support of the motion recited that affiant Louis March was the attorney for plaintiffs and

that on July 15, 1971, at 4:00 P.M. "he appeared at a certain office and by reason of said appointment was unable to appear before this Court at said pre-trial conference scheduled before this Court." The motion to vacate was denied.

Supreme Court Rules 218 and 219(c) set forth the rules governing pre-trial conferences and the consequences for refusal to comply with orders relating to pre-trial conferences. Ill. Rev. Stat. 1971, ch. 110A, pars. 218, 219(c). One of the prescribed sanctions for failure to attend a pre-trial conference is the dismissal of the cause of action. In the case at bar, the order for a pre-trial conference, which was served upon the plaintiffs' attorney, clearly sets forth that plaintiffs and plaintiffs' attorney must attend the conference and that failure to appear would result in the cause of action being dismissed under Supreme Court Rule 219(c). Neither plaintiffs nor their attorney attended the pre-trial conference. They did not request a continuance of the conference and made no effort to inform the court that they would not attend. The plaintiffs do not deny that they received notice of the pre-trial conference. The only reason stated in their motion to vacate for their failure to attend is that plaintiffs' attorney had a meeting at an unnamed office and was therefore unable to appear at the pre-trial conference.

Plaintiffs do not dispute the propriety of a dismissal for failure to attend the pre-trial conference, but argue that the dismissal was an abuse of discretion, in view of the fact that plaintiffs appeared at the first pre-trial conference and that the dismissal denied them fundamental fairness. In Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464, 236 N.E. 2d 719, the Supreme Court reversed an order of the appellate court which held that a motion to vacate a dismissal for failure to attend the pre-trial conference should have been granted. There, the

case was dismissed when plaintiff failed to attend the pre-trial conference. Plaintiff did not receive notice of the pre-trial conference, but notice was published in the Chicago Daily Law Bulletin. Plaintiff claimed that her failure to attend was not willful, but was due to mere inadvertance. The Supreme Court held that dismissal is a proper remedy for failure to attend the pre-trial conference and, that in the absence of fraud, the motion to vacate was properly denied.

In Forsberg v. Meyer Braiterman, et al., 101 Ill. App. 2d 475, 243 N.E. 2d 433 (abstract only), we reversed an order of the trial court which had vacated a dismissal for want of prosecution. There, plaintiff failed to attend a pre-trial conference and the case was dismissed for want of prosecution. Thereafter, plaintiff filed a motion to vacate, reciting that they did not have notice of the pre-trial conference because the attorney for plaintiff was a member of the Illinois Crime Investigating Commission and was in conference in Springfield with that Commission at the time of the pre-trial conference. We held the motion to vacate should have been denied, saying (p. 6): "We can only conclude that the failure of the plaintiff to attend the pre-trial conference on May 10, 1965, if only for the purpose of seeking a continuance was inexcusable."

The facts of this case support dismissal of a suit more than did the facts of the cited cases. Plaintiffs do not deny that their counsel received notice of the scheduled pre-trial conference well in advance. The notice itself stated that failure to attend would result in a dismissal of the suit as provided under Supreme Court Rule 219(c). Plaintiffs' failure to attend the conference or contact the court regarding their inability to attend was inexcusable. There is no suggestion of fraud or unconscionable behavior on the part of the litigants or the court, but rather it is apparent that the dismissal

resulted from plaintiffs' failure to comply with rules of the Supreme Court. Under these circumstances, dismissal of the suit was the proper remedy when plaintiffs failed to attend the pre-trial conference.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Second Division.

Judge Downing did not participate.

Publish abstract only.



59090

WALTER J. EGEBERGH,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RICHARD F. SCHUMANN,	)	HON. JOSEPH R. SCHWABA,
	)	Presiding.
Defendant-Appellee.)	

*PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

On August 7, 1969, a judgment by confession was entered in favor of plaintiff against defendant in the amount of \$757.85. On October 12, 1972, plaintiff filed a summons to confirm the judgment by confession. On March 27, 1973, the trial court, "having heard the evidence and the arguments of counsel and being fully advised in the premises", vacated the judgment by confession and entered a judgment in favor of defendant. On April 5, 1973, plaintiff's motion to vacate the order of March 27, 1973, was denied. Plaintiff appeals.

A verbatim transcript of proceedings was not filed. On May 4, 1973, plaintiff's attorney filed a motion to approve report of proceedings. In the motion, plaintiff's attorney stated under oath that on August 7, 1969, a judgment by confession was entered against defendant in the amount of \$757.85, based upon a promissory note signed by defendant. On August 8, 1969, defendant approached plaintiff with a check in the amount of \$321.50 marked paid in full or words to that effect; the check was accepted by plaintiff and endorsed by him. Counsel then argues that as a matter of law there can be no accord and satisfaction where the matter had already been adjudicated and the amount was therefore liquidated.

In response to plaintiff's motion, defendant filed a reply to plaintiff's report of proceedings. Therein, defendant,

*Mr. Justice Hallett did not participate.

appearing pro se, denied any knowledge of a judgment entered August 7, 1969. Defendant stated that prior to August 6, 1969, he approached plaintiff via telephone at which time plaintiff agreed to accept a check for \$321.50 in full payment of the promissory note. Defendant stated that plaintiff accepted the check for \$321.50, endorsed in full satisfaction of all claims.

The trial court ordered that plaintiff's report of proceedings and defendant's reply to plaintiff's report of proceedings both be approved and ordered filed.

Plaintiff's only argument on appeal is that the trial court erroneously ruled that an accord and satisfaction had been established by the evidence. The rule is well established that the party prosecuting an appeal must furnish and assert the material essential to the disposition of the appeal. (Perez v. Janota, 107 Ill. App. 2d 90, 246 N.E.2d 42; Houswerth v. Seidel, 47 Ill. App. 2d 112, 197 N.E.2d 271.) There is a presumption that a judgment which recites that the court conducted a hearing and was fully advised was supported by sufficient evidence absent a contrary indication in the order or in the record. (Skaggs v. Junis, 28 Ill. 2d 199, 190 N.E.2d 731.) Where it is alleged that the evidence is insufficient to support a trial court's order, the burden of preserving that evidence rests upon the party who appeals from that order. Doran v. Doran, 7 Ill. App. 3d 614, 287 N.E.2d 731.

In the case at bar, plaintiff's report of proceedings recites only that a judgment by confession was entered on August 7, 1969, and that on August 8, 1969, plaintiff accepted a check from defendant for \$321.50 marked "paid in full, or words to that effect." Defendant's reply to plaintiff's report of proceedings recites that prior to August 6, 1969, defendant contacted plaintiff, at which time plaintiff agreed to accept a check for \$321.50 as payment in full of the promissory note and that the check was

accepted by plaintiff prior to August 6, 1969. The check itself does not appear in the record. Based upon plaintiff's report of proceedings and defendant's reply, which were both filed in the trial court, it is impossible to determine what evidence was presented to the trial court, what findings were made by the trial court and what defenses were considered. Both are contradictory on several important issues and neither is a comprehensive report of the proceedings at trial. Plaintiff has failed to meet his burden of presenting a report of proceedings properly settled and certified by the trial court. (Supreme Court Rule 323(c), 50 Ill. 2d R. 323(c).) It must therefore be presumed that the evidence heard by the trial judge was sufficient to support his decision. Perez v. Janota, 107 Ill. App. 2d 90, 246 N.E.2d 42.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only).

CHICAGO BAR
ASSOCIATION
FROM THE CIRCUIT

IN RE REGINALD PRICE, a minor,
Respondent.

HON. RICHARD K. COOPER,
Presiding.

Reginald Price (respondent) appeals from a finding of delinquency based on the charge that he committed the offense of rape on December 13, 1972, in violation of Ill. Rev. Stat. 1971, ch. 38, par. 11-1. On this appeal, he contends: (1) he was not proven guilty of rape beyond a reasonable doubt; (2) he was improperly arrested and the lineup identification testimony should consequently have been suppressed; (3) the victim's identification of him was not based on an adequate opportunity to observe her assailant; (4) he was denied a fair trial because the prosecutor discussed facts not in evidence during his closing argument; and (5) he was entitled to counsel at the lineup at which the victim identified him.

Chicago Police Officer John Gregory testified: On December 14, 1972, he arrested the respondent at Mount Sinai Hospital. He and his partner had been investigating a series of seven or eight rapes that had occurred in this vicinity and had asked a male nurse at the hospital, one Davenport, to let them know if he heard anything. Pursuant to a call from Davenport, he and his partner arrived at the hospital and spoke with Davenport who told them there were "two guys", one of whom had something wrong with his penis. The description he had of the persons responsible for this series of seven or eight rapes, which he

*Mr. Justice Hallett did not participate.

had culled from the police files, was that of two male Negro youths, both between the ages of 16 and 17 and both slightly built, with one wearing a brown coat and blue jeans. One of them was five feet seven or five feet eight inches tall and the other was five feet six inches tall. The respondent and the boy who was with him met this description, and the respondent was wearing a brown coat and blue jeans when he was at the hospital. The officer described his questioning of the respondent about what was wrong with him as follows:

"He said, 'I had a girl named Joyce today, and she messed me up,' and I said, 'What do you mean?' and he said, 'I don't know. I tried to have sex with her, and I messed up.'"

Davenport had cooperated in giving reliable information in the past and Officer Gregory had discussed with him the various rapes that had been going on in that area within a two or three week period.

The motion to quash the arrest was denied.

At the trial the complainant, whose first name was not Joyce, testified that at 7:20 P. M. on December 13, 1972, she was walking down the street coming home from work when two men came across the street toward her. One man, whom she identified in court as the respondent, had a small black gun and when he got near he turned her around and they started walking in the opposite direction a half block until they came to an abandoned building, where they pulled her cap down on her face. She had never seen the respondent before but she remembered him because she looked at him when he was coming across the street and saw him "clearly" and "really got a good look at him." He had said, "Look ahead, and get your purse on your arm." Somebody was coming down the alley but she was afraid to scream because she knew he had a gun. They put her coat on the floor and pushed her down

on the floor and both of them had intercourse with her. While one was having intercourse, she was pushing him off and told him he was killing her, and he told her to stop pushing him. The first one who had intercourse gave the gun to the other. After she got up, they put her coat on and said they would let her keep her coat. Two or three dollars were missing from her purse. They told her to wait five minutes and she waited long enough so she wouldn't have to see them, then ran out of the building and around the corner to her home. She didn't want anyone to know she was "in disarray" so she just pushed her stocking, which had been torn off, into her boot. Her vaginal area was bleeding. She identified the respondent eight or nine days thereafter from among about eight men who, along with a policeman, were standing in a row. The day after the offense she described her assailant to the police as having a blue cap, being about her height or a little taller, having light brown skin and wearing a brown jacket with a pile lining. She did not have any doubt about her identification of the respondent and was certain because she got a good look at him but didn't get a good look at his companion.

The victim's mother testified that at about 8:00 P. M. on December 13, 1972, she was at home waiting for her daughter who was due to arrive by 7:30. She heard her daughter coming up the stairs, crying and saying, "Mother, I have been raped." Her daughter had no panties and was bleeding. There was blood on her daughter's vaginal area and on all her clothes and down her legs.

Chicago Police Officer John Gregory testified that he arrested the respondent during the early morning hours of December 23, 1972, and was present at a lineup when approximately six persons, including the respondent, were viewed by the complainant who identified him.

Reginald Price, the respondent, testified he was 16 years of age and he denied the offense saying he was at home with his mother and his aunt.

Respondent first contends his guilt was not proven beyond a reasonable doubt because the victim failed to resist, to complain immediately and because she admitted she was unable to see during intercourse. However, the record shows that the complainant testified she did resist by pushing her attackers off, but did not resist further because she was frightened since her attackers had a gun. Futile resistance that might endanger the life of the female is not necessary to show that an act of intercourse was against the will of the female. (People v. Smith (1965), 32 Ill. 2d 88, 203 N.E.2d 879.) The record contradicts the assertion that the victim did not promptly complain. She immediately ran home and told her mother she had been raped. Her testimony was corroborated by that of her mother, who described her physical condition a few minutes after the crime. The testimony of the victim is sufficient to support a rape conviction provided the testimony is clear and convincing. The testimony here was clear and convincing and it was also corroborated by prompt outcry and by the testimony of the victim's mother. People v. Wright (1972), 3 Ill. App. 3d 829, 279 N.E.2d 398.

Citing People v. Bean (1970), 121 Ill. App. 2d 332, 257 N.E.2d 562, respondent contends that his identification should have been suppressed as the fruit of an unlawful arrest. An arrest without a warrant may be made when a police officer has "reasonable grounds to believe that the person is committing or has committed an offense." (Ill. Rev. Stat. 1973, ch. 38, par. 107-2(c).) If the facts known to the officer, from the totality of the circumstances, are sufficient to warrant a man of reasonable caution in believing that the person has committed an offense, the arrest is justified, and while reasonable cause means

"something less than evidence that would result in a conviction", it may be founded upon evidence that would not be admissible at the trial. People v. McCrimmon (1967), 37 Ill. 2d 40, 43, 224 N.E.2d 822.

A somewhat similar situation was involved in People v. Mills (1968), 98 Ill. App. 2d 248, 240 N.E.2d 302. Mills contended that a general description of him as the robber would have fit "thousands of persons" and consequently his arrest was based not upon probable cause but upon mere suspicion. Since the police were investigating cab driver robberies following a recurring pattern and spotted the defendant in a taxicab in the area in which the robberies had been taking place within ten minutes of the latest robbery, only a short distance from the scene of the crime, the court concluded the officers had probable cause although the description the police had said only that the assailant was a male Negro, about 30 to 40 years old, between five feet nine inches and five feet eleven inches in height, 145 to 155 pounds, medium complexion and wearing a dark hat and coat.

Likewise, in the case before us, the police were investigating a series of rapes committed, on the basis of the information available to them from the police department files, by two male Negro youths, 16 or 17 years old, one or both of whom wore a brown coat and blue jeans; one five feet seven inches or five feet eight inches tall and the other five feet six inches, both slightly built. At the time of the arrest, the respondent was dressed in a brown coat and jeans and was with another male Negro of the same age at a hospital where he had come for medical treatment because there was "something wrong with his penis" because a girl with whom he had attempted intercourse had "messed" him "up". The hospital was located in the area where the seven or eight rapes under investigation had occurred, and the police were summoned to the hospital by a reliable informant whom they had

asked to alert them if he should "hear anything" in connection with the crimes under investigation. Respondent's explanation of his medical problem was that he "tried to have sex with" a girl named Joyce and she "messed" him up. While the officers did not have a recent crime before them, as in People v. Mills, supra, they had reasonable ground to believe that the respondent, under these circumstances, might have been injured in attempting a rape, of which, as yet, there had been no complaint. Thus, they had reasonable cause to arrest the respondent especially when the above information is considered together with all the other circumstances in the case, including the series of rapes, the fact that respondent and the other boy fit the general description they had culled from the police files, and the fact that the hospital and the suspects were in the same area. We conclude that the motion to suppress was, consequently, properly denied. In view of this conclusion, we need not pass upon the issue as to whether illegality of the arrest might have rendered the identification of defendant inadmissible.

Respondent also contends that the in-court identification was not sufficient to prove him guilty beyond a reasonable doubt. However, the record shows that the complainant's identification of the respondent at trial was positive and unequivocal. She testified that although it was dark she could "clearly" see the respondent from across the street as the two men approached her and that she "really got a good look at him." She testified she did not have any doubt about her identification of the respondent. Under these circumstances, the fact that she could not identify any particular facial characteristics of the respondent does not fatally weaken her identification of him. (People v. Henderson (1971), 133 Ill. App. 2d 336, 273 N.E.2d 244.) This fact is but one that may properly be considered by the trier of fact in assessing the credibility and reliability of the identification. It is significant also that the respondent, at trial, did not suggest

any respect in which the complainant had failed to observe and report any particular facial characteristics. This being the case, it may be assumed that the trial judge, who saw the respondent during trial, was in a better position to observe the weight, if any, to be given to the fact that no particular facial characteristics were described by the victim.

Respondent also contends that the witness was not able to identify which of the men raped her because the men pulled her cap down over her face during intercourse. However, she testified that both men had intercourse with her. People v. Thompson (1970), 121 Ill. App. 2d 163, 168, 257 N.E.2d 197, cited by respondent, is distinguishable because there a rape conviction was reversed on the ground that the victim lacked a sufficient opportunity to view her assailant when he approached her suddenly from the rear and she turned around once to see who it was, but otherwise did not turn around. In the case at bar, the victim had a much better opportunity to observe her assailant before she was told not to look and was prevented from looking at her assailant.

Respondent next complains it was reversible error for the Assistant State's Attorney to state during closing argument on the motion to suppress:

"When you talk about messing up a penis, you are not talking about gonorrhea or syphilis. You are talking about an injury to the penis, which you know does not occur in the ordinary course of intercourse."

The court sustained an objection by the respondent and indicated it realized that even injury to the penis "doesn't necessarily mean he committed a rape." Although there was no evidence that there was an injury, it is clear that the Assistant State's Attorney was arguing the inference he thought should be drawn from the statement of the respondent that he had been "messed" up.

Any error that might thus have been committed was not reversible error since in a bench trial it will be presumed that the trial judge considers only competent evidence unless it is shown he was influenced by the incompetent evidence. (City of Crystal Lake v. Woit (1972), 3 Ill. App. 3d 1059, 1062, 280 N.E.2d 4.) Such is not the case here.

Finally, respondent contends that he was entitled to counsel at the lineup at which the victim identified him as her assailant. In Kirby v. Illinois (1972), 406 U. S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877, however, the court held an accused is not entitled to counsel at an identification confrontation held prior to the initiation of adversary judicial criminal proceedings. Since the confrontation here occurred prior to the filing of any formal charges, respondent's contention is without merit. (People v. Burbank (1972), 53 Ill. 2d 261, 272, 291 N.E.2d 161.) The judgment of the circuit court of Cook County is, therefore, affirmed.

JUDGMENT AFFIRMED.

(Abstract Only).

Bar Assn.
20 I.A. 434



No. 59361

CHARLES DOMAIIKA,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
THE BOARD OF FIRE & POLICE	)	HONORABLE
COMMISSIONERS OF THE VILLAGE	)	F. EMMETT MORRISSEY,
OF OAK LAWN, ILLINOIS, et al.,	)	PRESIDING.
)	
Defendants-Appellees.)	

MR. PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

Plaintiff, Charles Domaika, a police lieutenant in the Village of Oak Lawn, filed a complaint for administrative review in the circuit court of Cook County seeking to reverse an order of the Board of Fire and Police Commissioners of Oak Lawn suspending him for three days for filing a false police report. The trial court sustained the order of the Board, and plaintiff brings this appeal.

The pertinent testimony adduced at the hearing before the Board is as follows. On November 11, 1971, a two-car collision took place on a highway in Oak Lawn. Both vehicles had been proceeding in the same direction, with one vehicle in front of, and to the left of, the vehicle driven by Edward C. Karasek.

Officer Felmon, a member of the Oak Lawn police department for two years, investigated the accident. His examination of the vehicles revealed damage to the right rear fender and bumper of the first auto and to the left front fender of Karasek's vehicle. Felmon observed skid marks from Karasek's vehicle stretching twenty feet. Felmon also noticed the smell of alcohol on Karasek's breath. Although the officer testified that the subject's walk appeared to be normal, he characterized Karasek's attitude as cocky and obnoxious. Karasek repeatedly demanded that plaintiff be notified of his predicament. It developed that Karasek was not only plaintiff's personal friend, but also was an employee of plaintiff in a real estate enterprise engaged in during plaintiff's off-duty hours.

Karasek's behavior necessitated his removal to the police station. While an Officer Doyle transported Karasek to the station, the driver of the other vehicle took his wife, a passenger, to the hospital for examination. Felmon testified that it was his intention to cite Karasek for failure to reduce speed, but he did not intend to ticket the other driver.

At the station, Karasek remained uncooperative. He also declined to take a breathalyzer test, refused to present his version of the accident, and continued to demand plaintiff's appearance. At 11:30 p.m., Doyle telephoned plaintiff to report Karasek's demands. Plaintiff, who was to begin his supervision of the next shift at 11:45 p.m., replied that he would arrive in fifteen minutes. Plaintiff also told Doyle to tell Karasek to cooperate fully. When this message was relayed, Karasek changed his behavior and gave a statement.

In the preparation of the police report, Felmon left five spaces blank due to his uncertainty as to the correct answers. Among the spaces left blank were the one referring to Karasek's physical condition and the one referring to violations. Felmon marked the other driver's physical condition as "Apparently Normal."

When plaintiff arrived at the station, Felmon asked his opinion of the proper citation to be given. Plaintiff stated that where there were conflicting versions of the accident and a lack of actual physical evidence, a citation need not be issued where the accident was not serious. Plaintiff advised Felmon not to issue a citation and to mark the violation "Unknown." Felmon complied. At the hearing, plaintiff conceded that he had been informed that a passenger in the other vehicle had been taken to the hospital.

Felmon and plaintiff then discussed which box relating to Karasek's condition should be marked. The choices were four:

1. Obviously Drunk
2. Ability Impaired

3. Ability Not Impaired

4. Impairment Not Known

Felmon did not know the meaning of the fourth phrase. Plaintiff understood the term to cover those situations in which the driver had been drinking but had been removed from the scene before the investigating officer had a chance to determine his ability to drive. Without informing Felmon of the correct meaning of the phrase, plaintiff advised him to check the fourth box, and Felmon complied.

Although the accident occurred during the shift supervised by Lieutenant Gangloff and Gangloff remained at the station until 12:45 a.m., no one consulted him. On the following day, Gangloff refused to approve the police report, and summoned Felmon. Gangloff was disturbed by certain answers in the spaces relating to Karasek. When Gangloff asked Felmon what Karasek's physical condition had been, Felmon replied, "[D]runk." When Gangloff then inquired as to why the report did not so indicate, Felmon replied that he had been influenced by plaintiff. Gangloff then ordered Felmon to make out a new report in the manner "it should have been filled out in the first place."

Felmon informed plaintiff of Gangloff's reaction. According to Felmon, plaintiff read the report and expressed agreement with Gangloff. He stated that since Felmon had observed the subject's condition, the box labeled "Impairment Not Known" should not have been checked. Plaintiff erased that check mark and checked the box labeled "Ability Not Impaired." Plaintiff then signed the report in his supervisory capacity.

The altered report subsequently was questioned by Captain McNichols. Felmon was instructed to prepare a new report, "the way it should have been made out." In preparing a new report, Felmon checked the box marked "Ability Impaired" in describing Karasek's physical condition.

Plaintiff denied at the hearing that he acted improperly. He stated that Felmon initiated all the conversations and that

he merely responded in his role as a supervisory officer. He stated that prior to November 20, 1971, there had existed no rule prohibiting a supervisor of one shift from signing an accident report involving a different shift.

The sole issue presented is whether the trial court's sustaining of the order of suspension levied against plaintiff was contrary to the manifest weight of the evidence.

The standard for judicial review of decisions of administrative agencies is well established. Findings and conclusions of an administrative agency on questions of fact shall be held to be prima facie true and correct. (Ill.Rev.Stat. 1961, ch.110, par.274 et seq.) The courts must sustain the agency's finding unless shown to be arbitrary and capricious or against the manifest weight of the evidence. (Dorfman v. Gerber (1963), 29 Ill.2d 191, 193 N.E.2d 770.) Where substantial evidence supports the decision of the administrative body, a reviewing court cannot reweigh evidence and substitute its judgment for that of the board. Golden Egg Club v. Illinois Liq. Control Comm. (1970), 124 Ill.App.2d 241, 260 N.E.2d 329.

The Village of Oak Lawn's police regulations forbid the making of a false official report. In our opinion, the finding of the Board that plaintiff violated that rule is amply supported by the evidence. While the record reveals several instances of improper conduct by the plaintiff, we deem it necessary to consider only one action by the plaintiff to demonstrate his violation of the regulations.

When Officer Felmon reported Lieutenant Gangloff's refusal to approve the report, plaintiff himself erased the check next to the phrase "Impairment Not Known" and checked "Ability Not Impaired." Plaintiff knew or should have known that the revision was erroneous. The distinctive factor in designating a driver's physical condition is whether the consumption of alcohol affected the subject's ability to drive. The nature of the accident, the odor of alcohol, and Karasek's boisterous

attitude made the proper category to mark, at the very minimum, a judgment only Felmon could decide correctly. Indeed, Felmon testified that at the time plaintiff altered the report, there was a question in his mind regarding Karasek's ability to drive. And we note that subsequently Felmon reported Karasek's ability to drive had been impaired. The deliberate alteration of the report by plaintiff amounted to the making of a false official report.

Plaintiff argues that his action in altering the report from "Impairment Not Known" to "Ability Not Impaired" constituted a change to a more serious violation and evidenced his good faith, a position supported by Officer Felmon at the hearing. We do not agree. The revision actually exonerated Karasek in that it indicated his ability to drive had not been impaired, a fact not in accord with Felmon's final determination. Certainly it was not a decision which plaintiff could properly make.

The finding of the Board was not contrary to the manifest weight of the evidence. Accordingly, the judgment of the circuit court of Cook County sustaining the Board's decision is affirmed.

Judgment affirmed.

DEMPSEY and McGLOON, JJ., concur.



59484

NATHANIEL C. REED BUILDERS, INC.,)	
an Illinois Corporation,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
MORTON R. COHEN,)	
	)	Honorable
Defendant-Appellant.	)	Wallace I. Kargman,
	)	Presiding.

PER CURIAM:

Plaintiff, Nathaniel C. Reed Builders, Inc., brought this action for \$5,400, the balance allegedly due for remodeling work performed on the residence of the defendant, Morton R. Cohen, pursuant to an oral agreement between the parties on March 1, 1969, as modified from time to time thereafter. The plaintiff alleged that a \$600 payment made by the defendant's wife was mistakenly credited as a \$6,000 payment; that the defendant knew he had been credited with \$5,400 more than he had paid and that with intent to take advantage of this mistake, the defendant tendered payment of \$8,091.20 with a letter reciting the payment was the result of an agreement and in full satisfaction of the account; that plaintiff accepted the \$8,091.20 payment, believing it correctly represented the balance due; that defendant refused to pay the \$5,400 after plaintiff discovered its "accounting error" and requested payment. After a trial, the court, sitting without a jury, found that the defendant, whom the court described as a "sophisticated businessman with great business experience," ... "well knew the statement was in error when it gave him a credit on September 9, 1969, of a payment of \$24,500 when he had in fact paid to that date the sum of

\$19,100", and entered judgment for the plaintiff in the amount of \$5,400. On appeal, defendant contends: (1) the trial court's judgment was against the manifest weight of the evidence since the facts showed an accord and satisfaction; (2) a unilateral mistake of fact will not avoid an accord and satisfaction.

At trial, Nathaniel C. Reed testified that he and Mr. Cohen entered into an agreement for remodeling work on Mr. Cohen's kitchen and utility room and that the terms of payment were to be "costs plus 10 per cent". After starting the work, many other things were done in addition to work on the kitchen and utility room. Mr. or Mrs. Cohen would say, "Do this for us", and he would comply. He did not generally agree on a price for the extra work, except for the beams which he agreed with Mrs. Cohen would be \$600. Mrs. Cohen paid with a \$600 check and in making up the bill, he gave Cohen credit for \$6,000 instead of \$600. Plaintiff's Exhibit #1, admitted by stipulation, dated September 9, 1969, is a statement of account of Morton Cohen from the plaintiff, which shows the following figures:

"Total costs	\$35,082.97
Overhead and profit 10%	<u>3,508.29</u>
Total	\$38,591.26
Received	<u>24,500.00</u>
Balance due	\$14,091.26"

An original proposal from Hough Manufacturing Company for the kitchen cabinets was for only \$8,958, but Hough did additional work with the knowledge of Mr. and Mrs. Cohen. When he submitted the bill to Mr. Cohen, Mr. Cohen said he didn't like it and thought it was too high, particularly the Hough kitchen portion.

To resolve the dispute with Cohen about the bill, a Mr. Yardley of Hough was brought in and when he gave Cohen a credit of \$2,500, everything was "fine". Cohen paid \$3,500 in November and was given a credit of \$2,500 (from Hough) so when he (Nathaniel Reed) received the final check of \$8,091.26, he believed that was full payment of the total amount of the September 9, 1969, invoice.

Morton R. Cohen testified: Sometime during the month of February, 1969, he showed Mr. Reed a plan and blueprints for remodeling his kitchen. These plans were furnished by Hemphill, who had built his house and Hemphill's price was \$23,500. He told Reed, who had worked for him in the past, that he wanted to spend about \$15,000. Reed came up with a figure of \$19,500 and he said, "Okay. Go ahead". One day in March, Reed said he thought he could save Cohen some money and he agreed to the installation of wormy chestnut cabinets from the Don Hough Manufacturing Company. When, on March 12, 1969, he made the first payment of \$3,000 to Reed, he commented that it looked like they come within the neighborhood of the originally agreed \$19,500 and Reed said, "Could be". He conceded that certain of the items in the September 9, 1969, invoice were extras: the marble, the shower door, garbage cans sunk into the ground, cabinet lights and three beams his wife ordered for the family room. When he received the September 9, 1969, statement, he found Reed and told him he was "out of his mind", the original amount he wanted to put into the kitchen was \$19,500. A week or two later, he and Reed met at Cohen's home and this was the first he knew that Reed was charging him on a cost plus basis and he told Reed he was never informed of any progress, of the

amount, nor told the amount was substantially exceeding what had originally been agreed upon. Reed apologized for the excessive cost and blamed it on Hough, and on November 15, 1969, he (Cohen) gave Reed a check for \$3,500 when he was "pleading for money that he had to pay labor and bills with". When Reed later called for more money, he told him he had been paid in full and that any charges over and above \$19,500 were Reed's "problem", and told Reed he could sue, but when his wife started to cry, he offered an additional \$5,000 and Reed countered with an offer that "made the figures come out to \$8,091.26". They shook on it, Cohen wrote a check and dictated a letter dated December 5, and sent the check and letter to Reed. The check, which was admitted into evidence, was for \$8,091.26 and contains the words, "in full payment of balance due" on its back; the letter of December 5, 1969, also admitted into evidence, states:

"This letter confirms our agreement today in arriving at the balance of \$8,091.26, as the complete balance due you for your kitchen remodeling and other miscellaneous work done in our home, at 150 Timber Lane, Glencoe. As agreed, I'm enclosing my check for the above amount, in full payment of our account. Sincerely, Morton R. Cohen."

On cross-examination, he testified that at the time the bill was rendered on September 9, he knew he had paid Reed \$18,500 and that his wife had paid Reed \$600, but when asked if at that time he knew he had paid \$19,100, even though Reed's bill reflected payment of \$24,000 (sic), Cohen answered: "I didn't even notice the amount of money that he had credited me". However, Plaintiff's Exhibit #6, admitted into evidence, a copy of Plaintiff's Exhibit #1, dated September 9, 1961, except for certain markings in Cohen's

handwriting, showed a credit of \$2,500.

From the foregoing, it is clear that the plaintiff did extensive remodeling to defendant's premises, including the kitchen, and that there was a dispute between the parties over the cost of the kitchen work. The defendant was given a \$2,500 credit. Apart from this dispute, the plaintiff mistakenly posted defendant's wife's \$600 payment as \$6,000 - a \$5,400 accounting error - which plaintiff did not discover until later, but of which defendant, the trial court found, was aware, on December 5, 1969, when he made his payment of the \$8,091.26 balance, a figure that reflected both the \$2,500 credit and the \$5,400 mistake. The question arises whether this was an accord and satisfaction which discharged the entire claim or whether the acceptance of the smaller sum was a compromise only of the dispute involving the kitchen, thus leaving the \$5,400 still due.

Defendant first contends that the trial court's judgment was against the manifest weight of the evidence. We disagree. The trial judge saw and heard the witnesses and he was in a much better position than is a reviewing court to judge their credibility. Moreover, there is the fact that the September 9, 1969, invoice (Plaintiff's Exhibit #6), contains in the defendant's own handwriting, certain numbers: The figure \$10,591.26 is arrived at by subtracting "\$3,500" from the \$14,091.26 balance of the September 9, 1969, invoice. The \$3,500 is defendant's November payment. Subtracted from the \$10,591.26 is the figure of \$2,500, leaving a balance of \$8,091.26. Clearly the \$2,500 is the Hough kitchen credit. It is thus clear from this documentary evidence

that the figure of \$8,091.26 was arrived at by subtracting the \$2,500 credit from Hough Kitchens and the \$3,500 payment and that the figure does not reflect any other compromise, but rather reflects the \$5,400 error which credited Cohen with \$24,500 when he had in fact only paid \$19,100.

Defendant contends that the uncontroverted facts set forth an accord and satisfaction, but the record shows that the facts were not uncontroverted. The evidence was conflicting and the trial judge believed the evidence of the plaintiff. He found specifically that Cohen "well knew the statement was in error" when it credited him with \$24,500 instead of \$19,100. Plaintiff made an honest mistake in crediting the defendant with a payment of \$6,000 when in fact the payment was for \$600. To show an accord and satisfaction, there must be a meeting of the minds and an "agreement to accept partial payment in full satisfaction" of the claim. Metro-Goldwyn-Mayer v. ABC - Great States (1972), 8 Ill. App.3d 836, 291 N.E.2d 200. The court found that there was no such agreement and that the plaintiff made "the error" of "posting a payment of \$600 as \$6,000." The judgment was not against the manifest weight of the evidence.

Nevertheless, defendant maintains that a unilateral mistake of fact will not avoid an accord and satisfaction. But, like any other contract, an accord and satisfaction requires "a meeting of the minds with intent to compromise". Koretz v. All American Life & Casualty Company (2nd Dist: 1968), 102 Ill.App.2d 197, 198, 243 N.E.2d 586. In Holslag v. Morse (1st Dist: 1914), 188 Ill.App. 607 (abstract), the court found that where a contractor was "clearly

laboring under a mistaken idea when he accepted" a homeowner's check in full as the amount due to him and thus "cheated himself out of \$1,475.72", which the homeowner knew was an error and knowingly allowed the contractor "to cheat himself", the contractor's claim was not only a just one, but "a legal and binding obligation against" the homeowner (slip opinion, page 4).

In the case at bar, it is clear that the dispute consisted of the proper price to be paid for the kitchen and that when a credit of \$2,500 was agreed to for the kitchen component of the entire contract, everything was "fine". There was an agreement to settle the dispute concerning the price to be paid for the kitchen and in that respect, there was an accord and satisfaction as to that portion of the contract. There was, however, no agreement with respect to the \$5,400 which resulted from plaintiff's mistake in posting the \$600 payment of Mrs. Cohen. There was not and had not been a bona fide dispute about the \$600 payment and there could have been no agreement to compromise it since the error was unknown to the contractor but known to the homeowner. It is, consequently, clear that plaintiff did not agree to compromise this question, since it was not in issue.

A somewhat similar situation may be found in the case of People ex rel. Department of Public Works & Buildings v. The Southeast National Bank (1971), 131 Ill.App.2d 238, 243, 266 N.E.2d 778, where a secretary misplaced a decimal point in a bid resulting in an error of \$23,553. In that case, after discussing the precedents on unilateral mistake at some length, we concluded that to penalize the contractor "for this simple, honest mistake ... would

be unjust" and that any different result would be "unconscionable". In the case at bar, to allow this defendant, whom the trial court characterized as "a sophisticated businessman with great business experience" to take advantage of an honest mistake by the plaintiff of which, the court found, he was "well aware", would likewise be unconscionable. See also, Corbin on Contracts (1962), Volume VI, pages 177-180, section 1292, and Williston on Contracts, third edition (1970), Volume XIII, page 486, section 1573. Accordingly, we affirm the judgment of the circuit court of Cook County.

JUDGMENT AFFIRMED.

Third Division: Justice Mejda did not participate.



57553

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

DONALD HOLMES,)

Defendant-Appellant.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

Mr. JUSTICE HALLETT delivered the opinion of the court:

In 1969 the defendant pleaded guilty to two charges of rape and one of aggravated battery and was sentenced to not less than five nor more than eleven years on each of the rape charges and to no less than five nor more than nine years on the aggravated battery charge, the sentences to run concurrently. No appeal was taken and no post trial motions were made.

In 1972 the defendant filed a pro se petition for a post conviction hearing, alleging that his pleas of guilty were not voluntary in that he had so pleaded only after a bailiff had solicited and been paid a \$500 bribe in return for a promise of a sentence of four years to four years and a day. An assistant public defender was appointed, an amended petition was filed by him, supported by the affidavits of the defendant and his mother, a motion and later an answer were filed by the People and a full-scale evidentiary hearing in which nine witnesses were heard, was held, at the conclusion of which the petition was denied.

The defendant's appeal contends that the bailiff's unfulfilled promise induced his guilty plea and thus deprived him of due process. We disagree and affirm.

The defendant testified, in substance, that on October 16, 1969, Stanley Nykiel, the courtroom bailiff in Judge Ryan's courtroom, handcuffed him to a chair in a room behind that courtroom and told him, in the presence of his wife and mother, that his privately retained attorney was no good but that for \$500 he (the bailiff)

could arrange for a sentence of four years to four years and a day; that the money was to be placed in an unmarked envelope and delivered the next day at a side door; that he was then returned to the lockup; that the next day he was returned to said anteroom and, in the presence of his wife and mother, was told by the same bailiff that the money had been paid and that everything was straight; that when he was brought to the courtroom the bailiff told him that the deal could not be completed that day because Mr. Hanrahan ("the boss") was in the courtroom; that on November 5, 1969, he was again brought to the courtroom where the bailiff assured him that the deal would go through; that he then pleaded guilty, expecting to receive a four year sentence; that when he was sentenced to the longer term he started to object because the sentence was not what he had expected but the bailiff signaled him to keep quiet and he did so; that he was then taken back to the bullpen, where the bailiff told him that his case had been confused with another and that it would be corrected the next Monday; that the bailiff then took him to a room behind the courtroom from which he could see Judge Ryan; that he was then taken back to the county jail and a few days later to the penitentiary; and that he never saw the bailiff or the Judge again.

Eleanor Holmes, the defendant's mother, testified that Stanley Nykiel, the bailiff, brought her and the defendant's former wife to a room behind Judge Ryan's courtroom, where he handcuffed the defendant to a chair; that the bailiff told them that he could talk to the Judge and obtain a four year sentence for the defendant for \$500; that that afternoon a loan was obtained from Household Finance Corporation to pay that sum; and that the next day the two ladies turned the \$500 over to the bailiff, who later explained that everything was taken care of so that a four year sentence would be rendered after a plea of guilty.

Samuel Holmes, the defendant's father, testified that after

his wife had told him that \$500 was supposed to be given to a bailiff to help their son get a four year sentence, he went to Household Finance and borrowed somewhat over \$600, \$400 being for the son's case and the balance to pay off a car loan with another loan company.

It was stipulated that on October 16, 1969, Household Finance Corporation loaned \$697.62 to Samuel and Eleanor Holmes and that its records show that the stated purposes were \$400 "court money for son" and the balance to pay off an earlier car loan.

Angela Chapa, the defendant's ex-wife, was called as a witness by the State and testified that she hired Harold Turner to represent the defendant, to whom she was then married, and that she completed paying him on November 6, 1969, the day the defendant was sentenced.

Stanley Nykiel, called by the State, testified that in September, October and November of 1969, he was a deputy sheriff, probably assigned to Judge Ryan's courtroom, and that he never at any time in his life took money from a defendant or a relative.

Eugene Callaghan, called by the State, testified that he was the Assistant State's Attorney in the defendant's said case and that Harold Turner represented the defendant; that his first recommendation to Turner was 10 to 20 years and his second was 8 to 15 years, which he felt it was worth; and that after that offer he was advised that the defendant wanted to plead guilty.

Harold Turner, called by the State testified that he represented the defendant on the two charges of rape and one of aggravated battery and that he was hired by the defendant's mother; that, with defendant's permission, he conferred with the State's Attorney; that the result of those conferences was five to eleven years on the rapes and five to nine on the

aggravated battery, the sentences to run concurrently; that the defendant indicated that this was satisfactory and that he wanted to plead guilty; and that the defendant never said anything about a four year sentence or that he had any communications with anyone else.

At the conclusion of the evidentiary hearing the court denied the petition for post-conviction relief and this appeal followed.

On the testimony above abstracted, the trial court held that the defendant had not proved that his plea of guilty was not voluntary. And, as the defendant's brief here concedes, "There is no contention that the trial judge failed to adequately admonish defendant."

After a thorough study of the evidence submitted, we conclude that the trial court's decision was proper and should be affirmed. Even were we to accept as true the defendant's version, the bailiff was acting completely on his own, as the defendant must have realized and as the ultimate result shows. It would be a monstrous miscarriage of justice for us to hold that the defendant's attempt to fix a judge by paying off his bailiff should entitle him to withdraw his plea of guilty.

Judgment affirmed.

EGAN, P.J., and BURKE, J., concur.

Publish abstract only.



3D
20 I.A. 752

59015

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
RAUL COLLAZO,	)	HON. JOHN J. CRAWLEY,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Raul Collazo (defendant) was found guilty of battery (Ill. Rev. Stat. 1973, ch. 38, par. 12-3.) He was sentenced to one year at the State Farm. He appeals.

In this court, his only contention is that the State offered no evidence to prove the essential elements of intent or knowledge and also unlawfulness; his theory being that the circumstantial evidence of intent did not constitute proof beyond a reasonable doubt. The State responds that the evidence of guilt was sufficient beyond reasonable doubt.

The complaining witness, 26 years old, testified that during the early morning hours she was awakened in her apartment by the presence of an intruder and she felt a knife in her back. She screamed and was warned not to. This person, later identified by her as the defendant, was dressed in a bathrobe. He asked for money and she said that she had none but was on public assistance. He held the knife at her neck and committed an act of deviate sexual assault upon her. She received a cut on the neck and two small wounds on the back from the knife. Defendant then tied her feet with her bra and her mouth with other articles of clothing. After a time he released her and asked if she wanted some beer. She responded affirmatively. He left the apartment for about ten minutes and then appeared with beer which she drank. Defendant then had intercourse with her. He told her that she should not tell anybody and left.

That morning, another woman in the building asked the complaining witness what had happened because screams had been heard. She responded, "nothing happened." That afternoon, however, she told this person what had occurred and called the police. She knew defendant from having seen him paying rent to the landlady and knew that he lived on the same floor in apartment 206. The police officers took her to that apartment. There were approximately three girls and four men in the room and she identified defendant as one of them.

A police officer testified that he came to investigate the complaint. The door to the complainant's apartment "had been pried open." The complaining witness had a cut on her neck and a black eye. She referred the police to apartment 206. When the door was opened, the complainant shouted, "That's him." There were four other males in the room but they did nothing. Defendant ran to the washroom where he was apprehended. Prior to that time, the complainant told the officers that her assailant was a male Puerto Rican of thin build, 19 years old, wearing a black bathrobe. The officer testified that examination of the complainant at the hospital showed no abnormality other than a bruised eye and a cut on the neck. In her apartment, he also observed a bra and some strips of cloth from a ripped sheet which appeared to be stained with blood. From this officer's testimony on rebuttal, it was shown that he found the same brand of beer in apartment 206 that was found in the room occupied by the complainant.

Defendant testified in his own behalf. He denied that he lived in the apartment building but admitted that he had paid the rent one time. He denied that he had ever seen the complaining witness before. Her apartment was four doors away from number 206 where he was arrested, but he did not know that until afterward. He denied that he had ever entered her apartment or tied

her up or struck her. He testified that he had stayed in apartment 206 all night and until the police arrived the next day.

We find no legal difficulty in rejecting the defendant's contention. It is elementary that the existence of criminal intent, like any other fact, may be proved by circumstantial evidence. "[I]t has been broadly stated in many cases that there is no legal distinction between direct and circumstantial evidence as to the weight and effect thereof." (People v. Robinson, 14 Ill. 2d 325, 331, 153 N.E.2d 65.) Reviewing courts have consistently found proof of intent beyond reasonable doubt from circumstantial evidence only. In People v. Gooch, 70 Ill. App. 2d 124, 217 N.E.2d 523, cited and relied upon by defendant, the court found proof of intent to commit burglary from the surrounding circumstances. The same result has been reached in cases involving rape. (People v. Young, 6 Ill. App. 3d 119, 285 N.E.2d 159.) It has been frequently held that intent may be inferred "from the acts and conduct of the defendant which, with attending circumstances in evidence, reasonably indicates such an intent to the minds of others." People v. Haycraft, 3 Ill. App. 3d 974, 982, 278 N.E.2d 877, involving theft, and other authorities therein cited.

The complaining witness was injured, cut upon the neck and on the back with a knife or other sharp object, to the extent that blood was drawn. She was punched in the eye so as to cause a bruise visible to the police and at the hospital, and she was tied up with strips of sheet and portions of her own clothing. Her room was entered in the early morning hours without her permission or consent and she was subjected to sexual molestation. No inference other than criminal intent can reasonably be drawn from these facts.

Furthermore, this mass of circumstances is controverted only by the uncorroborated alibi testimony of defendant. The trial

court had no obligation to believe this type of testimony which, in our opinion, was not sufficient to raise a reasonable doubt of guilt. (See People v. Jackson, 54 Ill. 2d 143, 149, 295 N.E.2d 462, citing People v. Catlett, 48 Ill. 2d 56, 64, 268 N.E.2d 378.) The testimony of the complaining witness as regards commission of the battery upon her is corroborated by the police, by the evidence of her scream and by the visible marks and bruises upon her person. There is no issue regarding identification of the defendant. Defendant's attempted flight could be deemed evidence against him although he testified that he fled because of fear of the police. People v. Keller, 128 Ill. App. 2d 401, 405, 263 N.E.2d 127.

Under these circumstances, we conclude that the finding of guilty is not unreasonable, improbable or unsatisfactory and we find no reasonable doubt as to guilt. The mere denial by defendant is not sufficient to raise a reasonable doubt under the circumstances here disclosed. People v. Reese, 54 Ill. 2d 51, 57, 58, 294 N.E.2d 288.

The one authority cited by defendant is inapposite here. This case is People v. Gooch, 70 Ill. App. 2d 124, 217 N.E.2d 523, which is concerned with the need for proof of intent regarding burglary. Defendant was observed running from the premises which showed evidence of a forcible entry. A few moments later he was found hiding on the third floor of the same building accessible from the stairway on which he had been seen. His counsel argued lack of proof of the specific intent required to prove burglary. (See 70 Ill. App. 2d at 129.) The court held that proof of intent to commit the crime of burglary was amply proved from the surrounding circumstances and affirmed the conviction.

One further detail must be noted. The statutory penalty for a Class A misdemeanor such as battery is imprisonment "for any

term less than one year." (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-3(a)(1).) Accordingly, the sentence of the defendant is modified by reduction of one day, and, as so modified, is affirmed. See People v. Johnson, 15 Ill. App. 3d 741, 746, 305 N.E.2d 208.

JUDGMENT AFFIRMED AS MODIFIED.

EGAN, P. J., and HALLETT, J., concur.

57351



PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

RAYMOND R. CLEMENS,
Defendant-Appellant.

201.A. 772
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

HONORABLE
MAURICE W. LEE,
PRESIDING.

Mr. JUSTICE JOHNSON delivered the opinion of the court:

In a bench trial, Raymond R. Clemens was found guilty of aggravated assault, resisting arrest, and criminal damage to property. Upon appeal, the State confesses error in the aggravated assault and resisting arrest charges. The remaining issue, then, is whether the defendant is guilty of criminal damage to property.

Patricia Clemens testified that on March 15, 1972 she was at her home, located at 4550 South Wallace, Chicago, Illinois. She rented an apartment on the second floor. The defendant came to her door and asked her to go to a party with him. She declined and he left. Ten minutes later, three shots from a gun were fired through her window. Miss Clemens looked out the window and observed the defendant put a gun in his pocket. The defendant was subsequently arrested and identified by Miss Clemens as being the person she saw with the gun in his hand. The complaint charging the defendant with criminal damage to property alleged that the defendant knowingly damaged property by breaking three windows in the house at 4550 South Wallace Street belonging to Patricia Clemens, without her consent and such damage did not exceed \$150.

The defendant alleges that the State failed to prove the material allegation that the complaining witness was the owner of the damaged property or that she was in lawful possession of same.

In People v. Hardt (1946), 329 Ill. App. 153, 158, 67 N.E.

2d 487, 490, this court held that the title to a leasehold estate which a lessee has during the life of a lease is equivalent for all practical purposes to absolute ownership. Referring to the case of People v. Horr, 7 Barbour's Sup. Ct. Reps. (N.Y.) 9, the court stated:

"It is a general principle that possession is evidence of ownership, both real and personal property; and is conclusive evidence against a wrongdoer. * * * 'And the same principle applies to criminal as well as civil cases.'"

The defendants in Hardt were charged with malicious mischief. The statute involved punished any person who destroyed any building or fixture without the consent of the owner. The indictment alleged that the defendants did destroy a building without the consent of the lessee. The lessee in Hardt had a parol agreement to occupy the house for one year. The defendants had the indictment quashed. On appeal, the court reversed the order quashing the indictment.

The defendant cites People v. O'Brien (1949), 404 Ill. 236, 88 N.E. 2d 486. In O'Brien, the defendant's conviction of malicious mischief was reversed because the State failed to prove that the owner of the damaged premises named in the indictment was the owner of the premises. O'Brien is factually distinguishable from the instant case. In O'Brien, the witness only testified that he lived at the premises. He did not testify as to the nature or extent of his occupancy of the premises. This is substantially different from the instant case where Miss Clemens testified that she rented the apartment for a couple of months and paid rent to live there.

Unlike O'Brien, the testimony of Miss Clemens unquestionably proves that she had a lawful possessory interest in the premises damaged and this possessory interest is wholly congruent with the complaint allegation stating that the premises belonged to her.

We hold that the testimony of the complaining witness to the

fact of renting an apartment and living therein was sufficient to support a finding of guilty to the charge of criminal damage to property.

For the foregoing reasons, the judgment of the circuit court of Cook County finding the defendant guilty of criminal damage to property is affirmed. The judgments finding the defendant guilty of aggravated assault and resisting arrest are reversed.

Affirmed in part, reversed in part.

ADESKO, P.J. and BURMAN, J., concur.

Abstract only.

Plaintiff-Appellee,

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY

v.

) HON. ROBERT J. COLLINS,
) JUDGE PRESIDING.

Defendant-Appellant.

On November 12, 1970, the defendant, Carlton Henderson, pleaded guilty to armed robbery and unlawful use of a weapon and was sentenced to five years probation. The circumstances of the offense were that he and two other persons robbed customers in a business establishment while armed with a sawed-off shotgun. On July 26, 1972, while on probation, he was convicted of criminal damage to property and sentenced to one year in the Cook County Jail. The court then revoked his probation and after a hearing in aggravation and mitigation, sentenced him to five to fifteen years in the Illinois State Penitentiary. He appeals from this judgment, contending that his sentence is excessive and that he should receive credit for the time served on probation.

We consider first whether the sentence is excessive. The defendant argues that the "huge difference" between the original sentence of probation and the sentence imposed after the probation had been revoked demonstrates that the court abused its discretion in imposing the second sentence. He points out that when the court imposed the original sentence it determined that both his interests and those of society would be served best by placing him on probation. Yet it sentenced him to five to fifteen years in the penitentiary after his probation had been revoked.

When he imposed the original sentence, the trial judge said:

"Well, I can't see anything to be gained by sending an 18 year old to the penitentiary and I concur in that unless they have had previous serious records."

However, he also admonished the defendant:

"If you get into trouble while out on probation, you will be brought back before me. I will have to send you to the penitentiary for a long period of time. I want you to know, I don't want to see you again, because if I see you, that means that I have to send you to the penitentiary. I don't want to do that. I am relying upon you to behave yourself and enjoy life."

The granting of probation is not a matter of right; it is within the sound discretion of the court. (People v. Henderson (1971), 2 Ill.App.3d 401, 276 N.E.2d 372.) It is premised upon the concept that in certain situations, where the background and attitude of the offender warrant, the interests of both society and the offender are best served by providing an opportunity for individual rehabilitation under the supervision of a probation officer. (People v. Jeffries (1970), 120 Ill.App.2d 39, 256 N.E.2d 22.) In the present case, the remarks of the trial judge at the time of the original sentencing indicate that he regarded the offenses as serious ones, for which incarceration in the penitentiary would normally be imposed, but that in view of the defendant's apparent potential for rehabilitation he was willing to grant probation. When the defendant came before him following conviction for another crime, it was apparent that his faith in the defendant's ability to rehabilitate himself had been unjustified and that the nature of the offenses, as well as the defendant's prior record (two misdemeanor convictions), required a penitentiary sentence.

Section 117-3(d) of the Criminal Code (Ill.Rev.Stat.1969, ch. 38, par.117-3(d)), which was in effect at the time that the defendant was convicted, provided that:

"If the court determines that a condition of probation has been violated, the court may alter the conditions of probation or imprison the probationer for a term not to exceed the maximum penalty for the offense of which the probationer was convicted."

It was stipulated that the defendant had been convicted of criminal damage to property and sentenced to one year in the County Jail, and this clearly violated the conditions of the probation. Under the statute in effect at the time that the defendant was convicted, a person convicted of armed robbery could be sentenced to the penitentiary for any indeterminate term with a minimum of not less than two years. (Ill.Rev.Stat.1969, ch.38, par.18-2(b).) Thus the sentence imposed by the trial court was within the statutory limits.

Where the sentence imposed is within the limits prescribed by law, this court will not disturb it unless it demonstrates a manifest abuse of the trial court's discretion. In view of the defendant's prior record, the nature of the offense, and his subsequent inability to conform his conduct to the requirements of the law, we do not believe that the court abused its discretion in sentencing him to five to fifteen years in the penitentiary.

We next consider whether the defendant is entitled to credit for the time served on probation. At the outset, we reject the contention of the State that this matter should be left to administrative action by the Department of Corrections. Identical relief has been granted by this court on other occasions (See People v. Burton (1973), 14 Ill.App.3d 1096, 303 N.E.2d 16; People v. Chalmers, (1973), 14 Ill.App.3d 993, 303 N.E.2d 781.), and there is no reason that we should not grant it in the present case.

Both the State and the defendant agree that the time served on probation is to be computed from the time that the defendant was placed on probation until the time that a warrant was issued for his arrest. (People v. Burton (1973), 14 Ill.App.3d 1096, 303 N.E.

2d 16.) In the present case, the defendant was placed on probation on November 12, 1970, and the warrant for his arrest was issued on August 10, 1972. Accordingly, he served a total of one year, eight months, and twenty-nine days on probation, which should be credited to his sentence.

For the foregoing reasons, we affirm the judgment of the Circuit Court of Cook County sentencing the defendant to five to fifteen years in the penitentiary, and we remand the cause to the trial court with instructions to issue an amended mittimus reflecting credit for the time served on probation.

REMANDED WITH DIRECTIONS.

ADESKO, P. J., and JOHNSON,
J., concur. (Abstract only)

3D
1 201.A. 793

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY
)	
RICKY SMITH (a/k/a "CAPONE"),)	
)	
Defendant-Appellant.	)	HON. ROBERT J. COLLINS,
	)	JUDGE PRESIDING.

Mr. JUSTICE BURMAN delivered the opinion of the court.

On October 14, 1970, the defendant, Ricky Smith, pleaded guilty to aggravated battery and was sentenced to five years probation, the first year to be served in the Cook County Jail. At a revocation hearing held on February 6, 1973, it was stipulated that on December 13, 1972, while on probation, he was convicted of murder. The court revoked his probation and sentenced him to three to ten years in the penitentiary, and he instituted the present appeal, contending that the stipulation concerning his subsequent murder conviction was not a sufficient basis for revoking his probation and that the court erred by not admonishing him of his rights pursuant to Supreme Court Rule 402 (Ill.Rev.Stat.1973, ch. 110A, par.402) prior to accepting his admission that he was guilty of a probation violation.

We consider first whether there was sufficient proof that the defendant violated the conditions of his probation. The record reveals that the defendant's counsel, in the defendant's presence and with no objection by the defendant, entered into a stipulation with the State's Attorney that the defendant had been convicted of murder following a trial before Judge Fitzgerald of the Circuit Court of Cook County and that this constituted a direct violation of the defendant's probation. The defendant argues that this was insufficient because it proved only that he had been convicted of the offense, not that he had actually committed it, as forbidden by the conditions of his probation. In our view, this argument

cannot be made seriously. It is self-evident that once the defendant had been duly convicted of murder, this established with the greatest degree of certainty possible under our legal system that he had committed the offense.

Although the defendant does not appear to object to the use of the stipulation per se, we note that it is well established that an accused may, by stipulation, waive the proof of all or part of the case against him and, having done so, may not complain of the evidence that he has stipulated into the record. (See People v. Hawkins (1963), 27 Ill.2d 339, 189 N.E.2d 252.) We have also examined the case of People v. Smith (1969), 105 Ill.App.2d 14, 245 N.E.2d 13, which the defendant cites to us, and find it inapplicable to the present case. We hold therefore that the defendant's violation of his probation was sufficiently proved.

We next consider whether the trial court was required to admonish the defendant according to the provisions of Supreme Court Rule 402 prior to accepting the stipulation that he violated his probation. Several recent decisions in this district have held that Rule 402 does not apply to probation revocation hearings. (People v. Wilhite, No. 59251, filed March 18, 1974; People v. Hall (1974), 17 Ill.App.3d 477; People v. Beard (1973), 15 Ill.App.3d 663, 304 N.E.2d 707.) All of these decisions were rendered after the decision of People v. Pier (1972), 51 Ill.2d 96, 281 N.E.2d 289, relied upon by the defendant, and in none of them did the court feel that Pier compelled it to find that the admonitions provided for in Rule 402 were required. We have reviewed Pier ourselves and concur in this view. Although the case does contain some language to the effect that a defendant should be entitled to the same procedural safeguards that pertain to guilty pleas when he waives a judicial determination of the charge that he violated his probation,

it makes no mention of Rule 402 and appears from its facts to turn on the defendant's reliance upon an unfulfilled promise by the State's Attorney. We do not think, therefore, that Pier serves as a precedent for requiring compliance with Rule 402 in all probation revocation cases where the defendant admits violating the conditions of his probation.

Moreover, the United States Supreme Court recently stated in Gagnon v. Scarpelli (1973), 411 U.S.778, the basic due process requirements for probation revocations. It held that a probationer was entitled to notice of the alleged violation, an opportunity to appear and present evidence, a right to confront witnesses, an independent judicial determination, and a written report of the hearing. The record reveals that in the present case these requirements were met. We hold, therefore, that Rule 402 does not apply to the present case.

For the foregoing reasons, the judgment revoking the defendant's probation and sentencing him to three to ten years in the penitentiary is affirmed.

AFFIRMED.

ADESKO, P. J., and JOHNSON, J.

concur. (Abstract only)



58329

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT COURT
) OF COOK COUNTY.
vs.)
)
JIM PENDLETON,) HONORABLE FRANK J. WILSON,
) Presiding.
Defendant-Appellant.)

PER CURIAM: * (Second Division - First District)

Defendant, Jim Pendleton, was charged in a three-count indictment with the March 21, 1972, rape and robbery of Mildred Johnson (Ill. Rev. Stat. 1971, ch. 38, pars. 11-1(a) and 18-1) and with the March 21, 1972, robbery of Patricia Hollins. On June 26, 1972, the third count (robbery of Patricia Hollins) was stricken with leave to reinstate, and defendant entered a plea of guilty to the remaining two charges, and was sentenced to not less than four nor more than four years and one day on each count, the sentences to run concurrently. On this appeal, he contends: 1) the guilty plea should be vacated, since a factual basis for the plea was not contained in the record; 2) the court did not properly advise the defendant of the maximum sentence for rape as required by Supreme Court Rule 402; 3) he was denied equal protection of the law by the operation of former Section 702-7(1) of the Juvenile Court Act which discriminated between 17-year-old males and 17-year-old females; 4) the robbery sentence is excessive under the Unified Code of Corrections.

On June 26, 1972, defendant's attorney indicated to the court that the defendant had requested a conference with the court, and that, after the conference with the court had been held, he had spoken with his client and had conveyed to him the substance of the conference; defendant had then spoken with his mother and then with his attorney, and now wished to enter a plea of guilty to the

* HAYES, P.J., STAMOS and LEIGHTON, JJ., participating.

counts of the indictment, the third count having been dismissed by the State with leave to reinstate. The following colloquy then occurred:

"MR. NORRIS (assistant public defender):
 . . . At this time with respect to 72-1107, to the remaining two counts, Mr. Pendleton is requesting leave of Court to withdraw his plea of not guilty previously entered and enter a plea of guilty to that indictment.

"I have had occasion to advise him of the consequences of such a plea.

"THE COURT: Very well. What is robbery, one to twenty?

"MR. SALAS (assistant State's Attorney):
 Yes, judge.

"THE COURT: Pendleton, you understand what you are charged with, one count of rape, one count of robbery?

"THE DEFENDANT: Yes, sir.

"THE COURT: Your lawyer, Mr. Norris, indicated you wish to change your plea of not guilty to a plea of guilty, is that correct?

"THE DEFENDANT: Yes, sir.

"THE COURT: When you plead guilty you waive your right to a jury trial or a bench trial, your right to be confronted with witnesses, you understand that --

"THE DEFENDANT: Yes, sir.

"THE COURT: --you waive those rights.

"It is my duty to advise you on a plea of guilty to rape you may be sent to the penitentiary for not less than four years to an indeterminate term. On robbery, not less than one nor more than twenty. Knowing that, do you still persist in your plea of guilty?

"THE DEFENDANT: Yes, sir.

"THE COURT: Let the record show the defendant has been advised of the consequences of a plea of guilty to these two counts in the indictment, after having been so advised persists in his plea. In conformance with Rule 402 of the Supreme Court the Court did enter into a conference with Mr. Norris, Mr. Fitzgerald and Mr. Salas. I determined there was a factual basis to accept the plea of guilty on the facts in the conference. Also had a full hearing in aggravation and mitigation.

"Now, Mr. Pendleton, the Court indicated he would give you four years to four years and a day in the Illinois State Penitentiary. Mr. Norris told you that?

"THE DEFENDANT: Yes, sir.

"THE COURT: You agreed to that?

"THE DEFENDANT: Yes.

"THE COURT: Was there any threats or force used to obtain your plea of guilty?

"THE DEFENDANT: No, sir.

"THE COURT: Stipulation. . . ."

It was then stipulated between the State and the defendant that present in court were Mildred Johnson, Patricia Hollins, Officer Williams, and Annerino Pietrzak, who would testify to the facts heard in the conference, which facts "would establish the defendant's guilt of robbery and rape beyond a reasonable doubt."

While Supreme Court Rule 402(c) (Ill. Rev. Stat. 1971, ch. 110A, par. 402(c).) requires the court to determine that there is a factual basis for the plea, it has been held that this determination may be made off the record. People v. Doe, 6 Ill.App.3d 799, 286 N.E.2d 645. In the case at bar, the court stated explicitly that it had determined at the conference that there was a factual basis to accept the plea of guilty. Moreover, defendant entered into a stipulation with the State that the witnesses present in court, if allowed to testify, would testify to facts which "would establish the defendant's guilt of robbery and rape beyond a reasonable doubt." The record thus shows that the trial court did determine that a factual basis existed for the plea as required by Supreme Court Rule 402(c).

Defendant next contends that the trial court's admonition that upon conviction for rape, defendant might "be sent to the penitentiary for not less than four years to an indeterminate term" was not sufficient to apprise him of the maximum possible penalty for rape as required by Supreme Court Rule 402(a)(2) (Ill. Rev. Stat. 1971, ch. 110A, par. 402(a)(2).) Nevertheless, in People v. Chatmon, 14 Ill. App.3d 807, 808-9, 303 N.E.2d 470, the court pointed out that the court's use of the word "indeterminate" does not necessarily render an admonishment inadequate and a conviction void. A significant factor

in that case was that the defendant "not only consented to a conference between the trial judge, his own attorney and the prosecutor after which he decided to change his plea, but also, having discussed the conference with his attorney, was addressed by the trial judge in open court as to the exact sentence he would receive if he changed his plea," the sentence which he in fact received. The facts in the case at bar are nearly identical in that defendant received exactly the sentence he bargained for and the minimum sentence that could have been imposed on the rape charge.

Defendant next argues he was denied equal protection of the law because 17-year-old females charged with the same offense would have been eligible for treatment under the Juvenile Court Act, whereas he, a 17-year-old male, was not. (Ill. Rev. Stat. 1971, ch. 37, par. 702-7(1).) Although this precise contention was rejected by the Supreme Court in People v. McCalvin, 55 Ill.2d 161, 302 N.E.2d 342, in a case arising under the 1870 Constitution, the defendant argues that Section 18 of Article I of the 1970 Constitution, which became effective July 1, 1971, and provides that equal protection of the law shall not be denied or abridged on account of sex, nevertheless supports his position. This identical contention has also recently been rejected by the Supreme Court. In People v. Ellis, ___ Ill.2d ___, ___ N.E.2d ___ (No. 45745, filed March 20, 1974), the Court concluded that Section 2-7(1) was unconstitutional. The effect of the holding, however, was "to render the statute inapplicable to both males and females who were not 'under the age of 17 years', and that the failure to consider defendant eligible for treatment under its provisions did not deprive him of equal protection of the laws." Slip opinion p.4.

The State agrees that the minimum sentence on the robbery charge should be reduced to one year and four months to comply with Ill. Rev. Stat. 1973, ch. 38, pars. 18-1 and 1005-8-1(c)(3). The minimum sentence on the robbery charge is reduced to one year and four months

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and the judgment of the Circuit Court of Cook County, as modified,
is affirmed.

JUDGMENT AFFIRMED AS MODIFIED.

PUBLISH ABSTRACT ONLY.



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59477

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM CIRCUIT
)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
KENNETH MORGAN,	)	HONORABLE
	)	JAMES M. BAILEY,
Defendant-Appellant.)	)	PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

After a jury trial, defendant was found guilty of the murder of Leroy Berry (hereinafter Leroy) and was sentenced to 14 to 20 years. On appeal he contends that: (a) he should have been discharged due to the State's failure to bring him to trial within 120 days; (b) he was not proven guilty beyond a reasonable doubt; and (c) misconduct of the prosecutor, incompetency of his appointed counsel and bias of the trial judge combined to deprive him of a fair trial.

On August 28, 1971, defendant shot Leroy, his next door neighbor, who later died from these wounds. The evidence adduced at trial is as follows: Mrs. Ruby Berry, Leroy's mother, testified as a witness for the State that she last saw her son on August 28, 1971, at around 6:00 P.M. while attending her other son's wedding. At that time Leroy was alive and well.

Freddie May Berry, Leroy's wife for six years prior to the shooting, testified as a witness for the State that around 10:00 P.M. she and her husband had just come home from his brother's wedding. Upon arriving home he parked their car in front of the gangway, thus blocking defendant's car which was parked in the gangway. They went to defendant's apartment and she then knocked on defendant's door and Teresa, defendant's fiancée who lived with defendant, answered the door. Defendant was sitting on a bed located behind the door. Leroy stated that he had blocked the gangway with his car and if defendant wanted to get out,

defendant should knock on his door and he would move his car. Later, as they were getting undressed, Teresa knocked on their door. Leroy put on his trousers and went with Teresa out to the front porch and started talking.

At this time the apartment door was partly open. Defendant came out of his apartment with a gun in his hand. He walked past the Berry apartment and as he did so, the witness came out and stood in the hallway. Defendant opened the glass door leading to the porch, went out on the porch, said a foul word to Leroy and started shooting. After the shooting, the witness went back into the apartment, slammed the door and called the police. During this time Teresa was wearing a negligee.

On cross-examination it was brought out that because of Leroy's position on the front porch, she could not see him. The witness never went out on the front porch. She did have a clear view of defendant during the shooting.

Robert Ford, a Chicago police officer, testified as a witness for the State. On August 28, 1971, he received a radio transmission regarding a man being shot. The description of the offender wanted for the crime was a male negro over 40 years old wearing dark work clothes and accompanied by a female, white, in a negligee or night-gown type dress. He observed the couple walking on the street. His partner ordered them to halt, and the couple started walking toward the squad car. Then defendant told the officer that he shot Leroy. Defendant held his hand up and produced a .38 caliber revolver. There were six live rounds in the gun, and the revolver only holds six rounds. Defendant told the officers where he threw the empty shells. At no time did defendant flag down their police car.

William Batts, a Chicago police officer, testified as a witness for the State that he arrived when officer Ford and his

partner were with defendant and Teresa. He informed defendant that he was under arrest and then gave him Miranda warnings. Defendant told him that he and Teresa were in the apartment with a co-worker who had just left; that Leroy came over and told him that because he couldn't find another parking place, he parked behind defendant's car; that he then told Teresa to go to the window at which time she looked out and saw parking spaces on the opposite side of the street. Defendant further told the officer that Teresa went over to Leroy's apartment to inform him of the parking spaces on the other side of the street; that he heard an argument, went to the TV cabinet, put his gun in his rear pocket and went out in the hallway to see what was happening and when he saw Teresa and Leroy in an argument, he went to reach for Teresa and as he reached for her, Leroy hit him, at which time he started firing. Officer Batts observed no rips nor tears in defendant's clothing, no blood on defendant, nor any bruises or swelling.

The testimony of Donald E. Smith, a ballistics expert for the Chicago Police Department, was introduced by stipulation. He found that the bullet taken from Leroy's body was fired from the gun produced in evidence. There was a further stipulation as to the testimony of Dr. Jerry Kearns, a pathologist for the Cook County Coroner's office. He examined the deceased and found him to be a negro, male, approximately 25 years old, five feet eight inches tall and weighing 114 pounds. He found that the cause of death was a bullet wound of the abdomen, colon and kidney. Two bullets struck deceased. It was also stipulated that defendant is 46 years old.

Cleofus Johnson, a Chicago police officer, testified as a witness for defendant. He was Officer Batt's partner at the time of the events in question. He saw Leroy on the porch but

couldn't really describe what he was wearing. He did describe the porch. He made a report of the incident and when defendant's counsel at trial demanded the report, the prosecutor gave it to defendant's counsel. On cross-examination it was brought out that Johnson observed no cuts on defendant, saw no bruises nor blood.

Defendant testified on his own behalf. On New Year's Day 1971 he had observed Leroy and his brother on the back porch shooting pistols. On August 28, 1971, Leroy came to the door. Teresa was standing in the doorway, talking to a young mechanic who worked for him. Teresa was sending the young mechanic out for cigarettes when Leroy announced that he had parked across the driveway and that as soon as he found a place to move, he was going to move his car. Defendant acknowledged that Teresa was his fiancée and that they were living together. After going out for a second, the young mechanic returned and informed him that there was a place across the street for Leroy to park. He told Teresa to go and tell Leroy to move his car. During this time he was looking for some socks, found a pair and sat down in a chair. Then he heard a lot of noise and cussing. Leroy was cussing and screaming at Teresa on the front porch. He quickly got up out of the chair calling to Teresa to come back into the house. When he passed Leroy's apartment, the door was closed. He was concerned about Teresa because she was under psychiatric treatment. He found Teresa and Leroy on the front porch. Leroy's wife was in her apartment.

Leroy was standing down near the steps leading into the yard but then approached him and Teresa. Defendant told Leroy to go ahead into the apartment and extended his hand forward. At this time Leroy grabbed defendant by the arm and he pulled away from him to free himself, but Leroy didn't let go but

spun him around and hit him in his face, striking part of his nose and eye. He was blinded by the blow for a few seconds. They then went into a clinch together. Defendant was trying to hold onto him until he could see, but Leroy broke loose and Teresa started screaming, "Watch out, Morgan. He's got a gun." Defendant looked and saw Leroy's right hand in his pocket. Defendant quickly pulled his revolver out of his right rear pocket. As Leroy was grabbing for the gun, defendant "snatched swinging back from him and that is when the first shot was fired accidentally." He then fired two more shots as fast as he could and Leroy fell to the floor. Leroy had grabbed the barrel of the gun. Defendant had not wanted to hurt anyone but merely wanted to scare him.

On cross-examination defendant testified that he only heard Leroy's voice, and so he assumed Teresa was on the front porch. After the shooting they went down the street to try and call the police. Defendant admitted he fired the second and third shots intentionally. The gun belonged to defendant. Defendant usually kept the gun in his garage. About 6:00 P.M. that evening he put it in his rear pocket and brought it into the house. Defendant denied that he got the gun from off the TV set and said the gun was in his pocket the entire time. At the time of the shooting he was afraid of Leroy.

After walking down the street, defendant reloaded the gun. When he heard the police sirens, he started walking toward them. Defendant whistled and waved to the police, but they didn't see him originally and they passed by him. At the time of the shooting he couldn't see if Leroy had a gun. Defendant also acknowledged that he had prior experience and training with guns while in the army. Defendant weighs 150 pounds. Teresa had lived with defendant for about a year and was on the porch during the entire incident.

Leroy's wife testified, in rebuttal, that during the period they were married she never saw her husband with a gun nor had he ever owned a gun. Officer Batts testified in rebuttal that defendant told him the gun came from his TV cabinet. Defendant never told him that Leroy grabbed the barrel of the gun nor did he mention anything of his vision, about any accidental shot, nor about his fear that Leroy had a gun.

Opinion

Defendant's initial contention is that he should have been discharged pursuant to Ill. Rev. Stat. 1971, ch. 38, par. 103-5,* for not having been brought to trial within 120 days during which period he occasioned no delay. Defendant was arrested and held without bond on August 28, 1971. He argues that from this date until February 17, 1972, a period in excess of 120 days, he was not responsible for any delay and so should be discharged. The State on the other hand refers this court to the hearing held on December 3, 1971, where the hearing judge ordered the case continued until December 9, 1971, "motion defendant."

The basic question is whether in the relevant time period a delay has been occasioned by defendant. In People v. Hairston, 46 Ill.2d 348, 353, 354, 263 N.E.2d 840, the court stated:

" * * * a delay occasioned by an accused is a waiver of the right to be tried within the statutory period, and that the period starts to run anew from the date to which the cause has been continued because of such delay." [Citations omitted.]

The court then went on to hold that "a continuance or delay * * * occasioned because the counsel of an accused is engaged elsewhere"

* Ill. Rev. Stat. 1971, ch. 38, par. 103-5, in pertinent part recites:

"(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant, * * *."

is properly charged to defendant. The proceedings which took place on December 3, 1971, were as follows:

"THE CLERK: Kenneth Morgan.
 MR. MARTIN: I would like to file my appearance in this cause, your honor.
 THE COURT: Leave given Attorney Richard Martin to file his appearance for the defendant Kenneth Morgan. You have a copy of the indictment?
 MR. MARTIN: Yes, and waive the reading of the indictment.
 THE COURT: Has he been arraigned?
 MR. MARTIN: No, your honor.
 THE COURT: The defendant acknowledges receipt of a copy of the indictment; waives the formal reading of the indictment and enters a plea of not guilty.
 MR. MARTIN: That's correct, your honor.
 THE COURT: Judge Bailey for Monday morning, December 6th.
 MR. MARTIN: I have to be out of town that day.
 THE COURT: The 7th.
 MR. MARTIN: No.
 THE COURT: What day do you want?
 MR. MARTIN: December 9th, your honor.
 MR. BRICE: We would ask for a motion defendant, your honor.
 THE COURT: Motion defendant, December 9th, Judge Bailey."

From a review of the above colloquy it is apparent that the proceedings were delayed until December 9, 1971, solely as an accommodation to defense counsel, since he was going to be out of town. This factual situation falls squarely within Hairston and therefore a new period started to run on December 9th.

Defendant argues that because he was arraigned on December 3, 1971, and that counsel filed his appearance and a discovery motion on this day, he should not be forced to choose between his constitutional right to a speedy trial and his right to be represented by an effective counsel and having pre-trial discovery. Defendant cites People v. Nunnery, 54 Ill.2d 372, 297 N.E.2d 129, to support his position. In Nunnery the court noted that the varied fact situations that involve the 120 day rule must be carefully examined to prevent a "mockery of justice" either by technical evasion of the right to speedy trial by the

State or by a discharge of a defendant by a delay in fact caused by him. That court then went on to note that no explanation had been given as to why defendant's arraignment and appointment of counsel were delayed until the 115th day of the 120 day period; that the defendant's discovery motion did not necessitate a delay in trial; and that the State's Attorney erroneously told the court that there were six more weeks before the statutory period ended.

We believe that the factual circumstances of the two cases are such that Nunnery cannot be deemed controlling. Nunnery was premised on the fact that arraignment and appointment of counsel took place on the 115th day, without explanation by the State's attorney. (People v. Spicuzza, No. 45827, ___ Ill.2d ___, ___ N.E.2d ___.) In the instant case the arraignment and appointment of counsel did not come so late in the statutory period that we can view this delay as occasioned by inaction of the State. As we have already demonstrated, this delay was occasioned when defendant's counsel told the court he would be out of town and is therefore chargeable to defendant. Therefore, we find that defendant had no right to be discharged under the statute.

Defendant contends he was not proven guilty beyond a reasonable doubt. In his brief he states that he shot Leroy in fear for his own and Teresa's safety, after he had been attacked. He argues that he knew Leroy had a gun and he thought Leroy was reaching in his pocket for the gun at the time of the shooting. Defendant finally points to the testimony of Leroy's wife and argues that since she could not view her husband, her testimony must be discounted.

The evidence in the present case was conflicting on a number of points and was open to various inferences. It is well established that "[i]t is within the province of the jury to judge the

credibility of witnesses, weigh the testimony and determine matters of fact. The determination of the jury will not be disturbed unless the evidence is so unsatisfactory as to justify a reasonable doubt of guilt." People v. Benedik, 56 Ill.2d 306, 310, 307 N.E.2d 382.

It is undisputed that defendant shot Leroy. Defendant in large part urges self-defense and argues that his testimony as to what occurred between Leroy and himself stands unrebutted. The jury didn't have to believe this testimony (Benedik) and obviously chose not to do so. We believe the evidence fully supports this determination.

Defendant averred he saw Leroy with a gun some nine months prior to the shooting, while Leroy's wife, who had been married to him for six years, testified that he did not own a gun nor had she ever seen him with one. Defendant stated that he had kept the gun in his right rear pocket, even when he was sitting down, from 6:00 P.M. until the shooting. Yet in his statement to the police he told them he took the gun from the TV cabinet. Defendant argues that when he heard Leroy screaming at Teresa, with the gun in his rear pocket he went out to the porch, past the closed door of the Berrys' apartment. Leroy's wife, however, saw defendant carrying the gun in his hand as he walked by her door, which was partly open.

Defendant alleges that Leroy was the aggressor and struck him so that he was temporarily blinded, and that they struggled. Defendant was much bigger than Leroy. Leroy, 25 years old, weighed only 114 pounds, while defendant, 46 years old, weighed 150 pounds. Both officers Batts and Johnson, who were with defendant a short time after the incident, observed no rips nor tears in defendant's clothing nor did they see any blood, bruises or swelling on defendant. Of prime importance is defendant's argument that the first shot occurred as the immediate

result of the close quarter struggle between Leroy and himself. The question is thus raised, if, as defendant points out and as is corroborated by Leroy's wife, she could only see defendant shooting and never saw her husband during this entire sequence of events, why didn't she see both participants in a struggle? The logical inference, supported by the evidence, is that there was no struggle. Finally, defendant argues that he had to flag down a police car which had passed them. The evidence showed that defendant and Teresa were highly noticeable in that they were a racially mixed couple and because Teresa was dressed only in a negligee. Defendant's testimony is directly controverted by Officer Ford who testified that defendant was ordered to halt. Also, it should be remembered that Officer Batts testified that defendant never told him that Leroy grabbed the barrel of the gun; nor did he mention anything about his vision, about an accidental shot, nor about his fear that Leroy had a gun.

We have carefully reviewed the evidence and find that it fully warrants the conclusion that defendant was proven guilty beyond a reasonable doubt.

Defendant avers that the misconduct of the prosecutor served to prevent him from receiving a fair trial. Specifically, he argues that: (a) the prosecutor elicited testimony and dwelt on the race and relationship of defendant and Teresa and on the negligee Teresa was wearing, all allegedly irrelevant to the issues at trial; (b) the prosecutor tendered a police report to defense counsel in the presence of the jury; (c) the prosecutor cross-examined defendant on his prior experience with guns; (d) the prosecutor evoked testimony of the deceased's family, and (e) in the prosecutor's closing argument he: (1) tried to invoke sympathy for the deceased's family; (2) commented on the State's failure to call Teresa as a witness; and (3) defined "reasonable doubt" to the jury.

In his brief defendant has referred this court to several passages in the record where the prosecutor elicited testimony as to the defendant's living with Teresa. Additionally, there were several instances where questions referred to the nightgown Teresa was wearing. In none of the excerpts cited was an objection made. Defendant now asks this court to review this allegedly erroneous conduct of the prosecutor pursuant to the power given this court by Supreme Court Rule 615(a). Ill. Rev. Stat. 1963, ch. 110A, par. 615(a); People v. Smith, 74 Ill. App.2d 458, 221 N.E.2d 68.

"[I]t is highly improper for the prosecutor to do or say anything whose only effect will be to inflame the passion or arouse the prejudices of the jury against the accused, without throwing any light upon the case at hand." (People v. Bitakis, 8 Ill. App.3d 103, 108, 289 N.E.2d 256.) On the other hand, if testimony is relevant and material, it will not be excluded merely because it may also be inflammatory. (People v. Galloway, 28 Ill.2d 355, 192 N.E.2d 370; People v. Pearson, 4 Ill. App.3d 462, 281 N.E.2d 422.) It is primarily for the trial court to protect defendant from evidence more inflammatory than probative, and the trial court has discretion in that matter (People v. Dilella, 52 Ill. App.2d 403, 202 N.E.2d 77) as well as having discretion in the scope of cross-examination. People ex rel. Walker v. Pate, 53 Ill.2d 485, 292 N.E.2d 387.

Concededly the subject matter broached by some of the prosecutor's questions and discussed in his closing argument was of a nature that could be considered inflammatory. Yet, in the context of the factual situation presented, it was also relevant and material. Defendant posed several alternative theories to justify this killing. One of these theories was that he was protecting Teresa, his loved one. Therefore, it was

necessary to go into detail about his relationship with her. Furthermore, Teresa was the only other eyewitness to the killing and a person actively involved in the events leading up to and occurring subsequent to the killing. In order for the jury to get an adequate understanding of the entire circumstances surrounding this event, it was absolutely necessary to identify Teresa and describe her relationship to the parties involved. And defendant during his own direct examination fully admitted and relied on this relationship to form part of his defense.

Defendant, in trying to convince the jury that the first shot was accidental and that the second and third shots were made in self-defense, attempted to demonstrate that immediately after the shooting, he tried to get help and to call the police. He testified that he flagged down a police car but that the car first went by, not even noticing him. The State argues, on the other hand, that its officers pursuant to a radio call stopped defendant and Teresa, and that he did not flag them down. The State tried to prove that because of the way Teresa was dressed, the defendant's story was highly improbable, and that the police would hardly have not noticed them walking down the street. Thus Teresa's appearance in a nightgown became relevant to the issues at trial.

In reviewing the record in its entirety, we must agree with defendant that the prosecutor was a bit overzealous in the manner in which he treated this subject. We certainly cannot condone all that occurred. Yet the testimony was in large part relevant and material to the issues. At other times defense counsel initiated and commented upon this same subject matter. Defendant also corroborated and repeated much of what was stated in order to advance his theory of defense. As was stated in People v. Hawkins and Birdsong, First Dist. No. 57047, ___ Ill. App.3d ___ N.E.2d ___, quoting from People v. Ward, 32 Ill.2d 253, 259, 204 N.E.2d 741:

"[T]he purpose of review in a criminal case is not to determine whether the record is perfect but rather to determine whether the defendant has had a fair trial under the law and whether his conviction is based upon evidence establishing his guilt beyond all reasonable doubt."

In view of the overall strength of the case against defendant we find that any errors committed by the prosecutor in his references to defendant's relationship with Teresa, and with her manner of dress, were harmless beyond a reasonable doubt.

People v. Lipscomb, First District No. 57439, ___ Ill. App.3d ___, ___ N.E.2d ___; Chapman v. California, 386 U.S. 18.

Defendant argues that it was error for the prosecutor to tender a police report to defense counsel in the presence of the jury and cites People v. Lowe, 84 Ill. App.2d 435, 228 N.E.2d 563, and People v. Beard, 67 Ill. App.2d 83, 214 N.E.2d 577, to support this contention. In Lowe the prosecutor on his own initiative announced before the jury that he was giving defense counsel the reports, and in Beard the trial court ruled that only in the presence of the jury can defense counsel request police reports from the prosecutor.

In the instant case defense counsel, while questioning Officer Johnson who was called as a witness for defendant, and while in the presence of the jury, initiated the tendering of the police report to him. He wanted the report to refresh the witness' memory. Further, as defendant admits in his brief, defense counsel had probably seen the report previously. Since Lowe and Beard tried to prevent the situation where defense counsel is faced with the choice of either presenting to the jury a report of which he has no knowledge or of withholding the report and letting the jury infer he is hiding something, these cases are readily distinguishable. Rather, this situation falls within the rule that defense counsel cannot himself bring out evidence and then complain that this constituted reversible

error. People v. Bell, 53 Ill.2d 122, 290 N.E.2d 214; People v. Dowling, 51 Ill.2d 370, 282 N.E.2d 696; People v. George, 49 Ill.2d 372, 274 N.E.2d 26.

During the prosecutor's cross-examination of defendant, he questioned him about his prior training and experience with guns while in the army. Objections were made to this line of inquiry and were sustained by the court. Defendant contends that under People v. Hicks, 133 Ill. App.2d 424, 273 N.E.2d 450, this questioning constituted reversible error which was not cured when the judge sustained defendant's objections. The court in Hicks premised its decision on two factors: (a) that evidence of other crimes was introduced, and (b) that this subject matter had no relevancy to the issue in the case, being whether defendant's use of deadly force against the deceased was justified. In the instant case no other crimes were hinted at or could be inferred. Defendant at trial attempted to prove that the first shot he fired was accidental. The State, through this questioning, was thus trying to show that because of defendant's prior experience with guns, defendant's theory of accident was highly unlikely. Therefore, relevant information was being sought, and no error was committed by the prosecutor.

Defendant contends that reversible error was committed by the prosecutor when he elicited testimony from Leroy's mother and wife that Leroy and his wife had arrived home and parked his car, blocking defendant's auto, after attending his brother's wedding reception. No objections nor motions to strike were made to this testimony. The general rule is that "where testimony in a murder case respecting the fact the deceased has left a spouse and family is not elicited incidentally, but is presented in such a manner as to cause the jury to believe it is material, its admission is highly prejudicial and constitutes reversible error

unless an objection thereto is sustained and the jury instructed to disregard such evidence." (People v. Bernette, 30 Ill.2d 359, 371, 197 N.E.2d 436; People v. McCoy, 80 Ill. App.2d 257, 225 N.E. 2d 123.) Yet, as was stated in People v. Hyde, 1 Ill. App.3d 831, 840, 275 N.E.2d 239:

"[T]he mere fact that evidence of a victim's wife and family appears incidentally in the trial or is the subject of comment by the prosecutor in his argument does not automatically require reversal. The materiality of the testimony or comments, and the manner of its presentation must be considered."

The evidence as brought out occurred in connection with three points. Leroy's mother testified as to having seen Leroy at her other son's wedding in connection with her testimony as a life and death witness and with relation to the time and place of her last seeing Leroy. The testimony also related to the circumstances prior to the shooting, i.e. Leroy's parking in back of defendant's car, thus giving the jury some background material with which to put all the events into proper context. Finally, this testimony shed light on why Leroy was wearing tuxedo pants at the time of the shooting. It may well be that through more skillful questioning the prosecutor could have avoided bringing out that the wedding Leroy had come from was his brother's wedding. But from a review of the record it is apparent that this testimony was only brought out incidentally. The prosecutor made no attempt to dwell upon this testimony; nor was it presented as an issue in the case or a matter proper to be proven and considered. Its materiality was in no way suggested, and no effort was made to correlate it to either guilt or punishment. Nor, as was true in People v. McLean, 2 Ill. App.3d 307, 276 N.E.2d 72, cited by defendant, was this testimony emphasized by the trial judge's overruling defendant's objections. We therefore find that its effect, if any, upon the outcome of the trial was negligible.

Defendant next complains that the prosecutor's closing argument was prejudicial in that (1) he defined "reasonable doubt" to the jury; (2) he commented on the State's failure to call Teresa as a witness; and (3) tried to invoke sympathy for the deceased's family. In People v. Hawkins and Birdsong the court described the considerations to be used in reviewing closing arguments as:

"In view of the tremendous diversity in closing arguments and in situations resulting therefrom, this court has held that it is 'impractical to lay definite guidelines for what may and what may not be said in argument to a jury.' (People v. Gilmore, 118 Ill. App. 2d 100, 110, 254 N.E.2d 590 quoting from People v. Wilson, 116 Ill. App.2d 205, 253 N.E.2d 472.) The Supreme Court has frequently held that since the trial court has a superior opportunity to determine the propriety of final argument, questions pertaining thereto are generally left within the discretion of the trial judge. (People v. Smothers, 55 Ill. 2d 172, 176, 302 N.E.2d 324.)"

The court then went on to discuss the standard for review of arguments found to be improper as:

"In this situation, the Supreme Court and this court have applied a number of tests. We must determine whether the making of the arguments in question and sustaining of objections thereto constituted 'a material factor in the conviction.' (People v. Clark, 52 Ill.2d 374, 390, 288 N.E.2d 363) or resulted in 'substantial prejudice to the accused.' (People v. Nilsson, 44 Ill.2d 244, 248, 255 N.E.2d 432.) In other words, we must decide if 'the verdict would have been different had the improper closing argument not been made. * * *' People v. Trice, 127 Ill. App.2d 310, 319, 262 N.E.2d 276."

Defendant first argues that the prosecutor attempted to define "reasonable doubt" and refers this court to I.P.I. Criminal, Section 2.05, and People v. Malmenato, 14 Ill.2d 52, 150 N.E.2d 806, as authority for the proposition that this was reversible error. We note that the comments in question were merely made in an effort to explain to the jury that a reasonable doubt is determined by the standard of "reasonableness"

and is not the same as "beyond any doubt" or "beyond every doubt." This identical issue with almost the exact language involved was presented to our Supreme Court in People v. Edwards, 55 Ill.2d 25, 302 N.E.2d 306, and held not to be erroneous, although not the best practice.

Defendant argues that it was error for the prosecutor to comment on why the "State" did not call Teresa as a witness and cites People v. Gilmer, 110 Ill. App.2d 73, 249 N.E.2d 129, to support this theory. Teresa was admittedly defendant's fiancée and was present in the courtroom during the trial although not called by either the State nor defendant. Essentially all that the prosecutor did was to state the well established rule of law that "[t]he State is not obliged to produce every witness to a crime and the failure to produce a witness does not give rise to a presumption that the testimony of that witness would be unfavorable to the prosecution." (People v. Jones, 30 Ill.2d 186, 190, 195 N.E.2d 698.) Further, Teresa's materiality to the issues was principally injected into the case by defendant when he testified that she warned him that the deceased had a gun. Since it would have been entirely proper, on this evidence, for the prosecutor to have commented on the defendant's failure to produce Teresa as a witness (People v. Durso, 40 Ill.2d 242, 239 N.E.2d 842), we cannot see how defendant was prejudiced by the prosecutor's reference to the State's failure to produce her.

Defendant finally argues that it was error for the prosecutor to tell the jury that they would be instructed not to let sympathy for Leroy's mother and wife to enter into their decision of guilt or innocence and cites People v. McLean, 2 Ill. App.3d 307, 276 N.E.2d 72, to support this contention. The main distinction between McLean and the instant case is that in McLean the prosecutor specifically asked for sympathy for deceased's

family, whereas in the present case the prosecutor did exactly the opposite in telling the jury not to have sympathy for deceased's family. Further, the trial judge subsequently instructed the jury, in accordance with I.P.I. Criminal Section 1.01, not to let sympathy or prejudice influence them. Whether this comment by the prosecutor may in some fashion have evoked sympathy in the minds of the jury, in direct contravention of the literal meaning of the words actually spoken, is too speculative for us to find that they amounted to a significant factor in the jury's determination, sufficient to warrant reversal.

Defendant next contends that the incompetency of his court appointed counsel was such that he was deprived of a fair trial. He specifically raises error in his counsel's failure: (a) to move to suppress his oral statements; (b) to initially pursue a motion for discharge; (c) to object to prejudicial testimony; (d) to adequately present a closing argument; and (e) to be properly prepared for trial.

"In order to establish lack of competent representation at trial, it is necessary to demonstrate 'actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney' which results in substantial prejudice without which the outcome would probably have been different." (People v. Goeger, 52 Ill.2d 403, 409, 288 N.E.2d 416; People v. Abrams, 8 Ill. App.3d 636, 291 N.E.2d 16.) Defendant has the burden of establishing incompetency of counsel (People v. Kinsley, 10 Ill. App.3d 326, 293 N.E.2d 627), and appellate review of trial counsel's competence will not extend into areas involving the exercise of judgment, discretion or trial tactics. (People v. Walker, 2 Ill. App.3d 1026, 279 N.E.2d 23.) The fact that an attorney does not file a particular motion will not in itself establish incompetency of counsel. People v. Green, 36 Ill.2d 349, 223 N.E.2d 101.

During the trial Officer Batts related certain oral statements made after defendant's arrest. Batts specifically stated that prior to these statements defendant was fully informed of his rights under Miranda v. Arizona, 384 U.S. 436. There is no evidence in the record which would tend to show that any coercion was brought against defendant or that any of defendant's rights with regard to these statements was violated. The statements were properly admitted into evidence, and therefore there is no prejudice from counsel's failure to make a motion to suppress. Likewise, as we have already held that defendant was not entitled to be discharged under Ill. Rev. Stat. 1971, ch. 38, par. 103-5, no prejudice can be demonstrated by any alleged omission of counsel in this regard.

Defendant argues that his appointed counsel failed to object to prejudicial testimony introduced and elicited by the prosecutor. Most of the points raised here were discussed in relation to prosecutor misconduct and were determined to be proper and thus not subject to objection, or merely harmless error. Where an objection might arguably have been appropriate, it may well have been counsel's tactical decision not to object. We will not speculate on this matter for, taken as a whole, we cannot conclude that defendant has demonstrated actual incompetence of his counsel. We have carefully reviewed the record, the closing argument of defense counsel and the manner of his cross-examination and preparation. Parenthetically, we note that the trial judge during the hearing on aggravation and mitigation noted the difficulty faced by defense counsel in defending this case when he stated: "There is no way any lawyer could have possibly won this case." Defendant has failed to meet his burden of showing actual incompetence and prejudice sufficient to warrant a reversal.

Defendant argues that the conduct of the trial judge prejudiced him. He specifically avers that: (a) the judge permitted

himself to reveal his annoyance with defense counsel in the presence of the jury; (b) he made certain incorrect rulings which prejudiced defendant; and (c) he spoke with defendant when his attorney was not present.

During the course of the trial defense counsel on a number of occasions continued to argue an objection after the judge made his ruling. The judge was therefore required at one or two points in the trial to instruct defense counsel not to argue after his ruling and to continue with his questioning or to allow the prosecutor to continue with his questioning. "It is the duty of the presiding judge to see that the proceedings are conducted in an orderly manner with proper decorum, and the control of the conduct of the trial rests with his discretion." (People v. Long, 39 Ill.2d 40, 42, 233 N.E.2d 389; People v. Lewis, 25 Ill.2d 442, 185 N.E.2d 254.) Even though statements are directed at defense counsel regarding his conduct, this alone does not show prejudice of the court. (People v. Jerrels, 98 Ill. App.2d 213, 240 N.E.2d 479.) Nor can defendant now complain about these cautionary remarks brought upon defense counsel by his own sustained conduct. (People v. Lomax, 126 Ill. App.2d 156, 262 N.E.2d 63.) After reviewing the comments complained of, we find that the trial judge was properly exercising the discretion vested in him.

Defendant also argues that the trial court made certain evidentiary rulings which prejudiced him. His prime contention in this regard, and the only ruling to which defendant has cited case authority to support his argument, is that it was error to refuse to allow defendant to testify that at the time of the shooting he was fearful for Teresa's safety. We agree that this was error. "In criminal cases where the intention, motive, or belief of the accused is material to the issue, he is allowed to

testify directly to the fact." (People v. Smalley, 10 Ill. App. 3d 416, 423, 294 N.E.2d 305.) But, as in Smalley, such error was harmless beyond a reasonable doubt since defendant was allowed to and did testify to exactly these elements on cross-examination and later on redirect examination. Although defendant has not cited any case authority to support his arguments with regard to other allegedly erroneous evidentiary rulings made, we have reviewed these rulings and find them proper.

Finally, defendant comments in his brief that "the judge also revealed his indifference to the defendant's right to be represented by counsel, or at least this counsel, at all stages of the proceedings when he indicated that he had spoken with the defendant on one occasion when his lawyer had not been present." Nowhere in the portion of the record referred us by defendant can it be inferred that the trial judge spoke with defendant in the absence of his attorney. Further, on reviewing the record, it is apparent that with regard to the occasion noted by the trial judge when he had spoken with defendant, defendant's counsel was present. The trial judge in the instant case proved to be extremely conscientious in his efforts to protect defendant's rights and preside over the conduct of a trial in which both sides were vigorously argued by opposing counsel.

No trial can be entirely free from error nor any trial attorney perfect. We have carefully reviewed the record in the instant case and find that the points raised by defendant, either taken separately or cumulatively, were not such as deprived him of a fair trial. The judgment is affirmed.

AFFIRMED.

Sullivan, P.J., and Lorenz, J., concur.

Abstract only.



20 I.A. 824

59209

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	
)	
WILLIE BIRGE, JR.,	)	HONORABLE
	)	ARTHUR L. DUNNE,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

This appeal arises from a bench trial judgment in which defendant was convicted for rape and indecent liberties with a child and was sentenced to a term of four to seven years. Ill. Rev. Stat. 1971, ch. 38, pars. 11-1, 11-4, 11-5.

The appeal raises two issues: (1) Whether defendant was proven guilty beyond a reasonable doubt and (2) whether defendant was denied a fair trial by reason of certain questions asked by the prosecution.

On the evening of July 26, 1972, Esther Crawford, a 15-year old high school student, went with friends to a restaurant near Harlem Avenue and Lake Street in Oak Park. At approximately 10:45 P.M., she began to walk to her home a mile away. After she had walked a block along Harlem Avenue, a man, later identified as defendant, drove along side of her in a gray-brown Chevrolet. He stopped the vehicle and asked if she wanted a ride. She declined, and continued walking.

A few moments later, while Esther was looking in a store window, defendant stopped his vehicle along side of her and

* BARRETT, DRUCKER and LORENZ, JJ. participating

stepped out of the car from the passenger side. Defendant then grabbed hold of her arm and pulled her into his vehicle. As defendant reached toward his left back pocket, he told the girl not to scream or he would kill her.

Defendant drove to the Eisenhower Expressway and continued to drive along Chicago expressways for approximately one and one half hours. He warned Esther not to do anything wrong or he would kill her. Although Esther was uncertain of her destination, she observed signs for Indiana, Joliet and Palos Heights.

At approximately 12:30 A.M. defendant turned off the expressway onto a wooded side road. He dragged the girl from the vehicle along a muddy, grassy area. He pushed her to the ground and told her to remove her lower clothing. She panicked and screamed. Defendant then partly removed Esther's lower clothing as well as his own and proceeded to have sexual intercourse with her. Defendant ordered her to dress and they re-entered the vehicle.

After he had driven 30 to 45 minutes defendant again turned into another secluded area, where he suggested sexual intercourse. The girl pleaded with defendant that she had been ill and recently discharged from the hospital. Defendant retreated from his purpose and agreed to drive her home. He then drove her to Oak Park Avenue and Lake Street where he let her out of the vehicle. He threatened to kill her if she told anyone of the incident. As defendant pulled away, Esther noted the license number of his vehicle. The time was approximately 3:00 A.M.

She ran to the home of a girlfriend, Mary Branand, who lived nearby with her family and Mary let her in. Mary was

watching television in the family television room. Esther was crying hysterically when she first entered the house; but, after about 10 minutes she told Mary that she had been raped. She described the defendant and his vehicle. Esther then took a light bath at the Branand residence and slept there that night. Esther and Mary arose early the next morning (July 27th) to attend summer school classes. After school Esther associated with friends until about 10:00 P.M. when she went to her own home. She did not go home immediately because she was afraid to tell her mother of the incident. She had stayed away from home all night on prior occasions, but had always told her mother. She did not call the police from the Branand residence when she first arrived because she was "really scared." The police were eventually called when she arrived at her own home on July 27th. She was examined at a hospital late July 27th or early July 28th. Some two or three weeks later, she identified defendant's photograph out of a group of photographs shown to her by the police. She was not married to defendant, nor did she consent to have sexual intercourse with him on the night in question. She observed no weapon on his person on the night of the rape, although she was afraid that he had "a gun or something." She had not seen him before the night of the rape.

Mary Elizabeth Branand, a high school student and a friend of Miss Crawford also testified for the prosecution that between 2:30 and 3:00 A.M. on July 27, 1972, she had been "watching television and getting something to eat" when Esther knocked on the window. She let Esther into the house and observed that she was hysterical and covered with mud. Esther stated that she needed help and did not know what to do. After

crying for about 10 minutes Esther stated that she had been raped. Esther took a light bath, received clean clothes and slept at the Branand residence that night. They awoke about 7:00 A.M., at which time no one else in the Branand house was awake. They attended school, after which they associated with friends. Esther went home about 10:00 P.M.

The River Forest Police traced defendant through the vehicle information supplied by Esther. She identified him from a group of photographs shown to her the following month. The police were notified of the rape at 12:51 A.M. on July 28, 1972.

The parties stipulated that the physical examination report on Miss Crawford disclosed "normal adult; hymen not intact; moderate creamy white secretion in vagina; no lacerations noted; slides made; spermatozoa negative; mild inflammatory changes seen." It was also stipulated that Esther's purse was found about 22 miles from the point at which she had been abducted; that the defendant was 27 years of age; that Esther was 15 years of age at the time of the incident; and that she was 16 years of age at the time of trial.

Coreen Birge, defendant's wife of several years, testified for the defense that she worked in Melrose Park from 4:15 P.M. to 12:45 A.M. during the week of July 24-27, 1972, as evidenced by a photocopy of her timecard entered into evidence. Defendant picked her up in their 1971 Chevrolet automobile outside the plant on each of those nights, and they went home immediately thereafter. No one other than defendant drove her home from work any night during the week in question.

Vollie Brent testified for the defense that he had been at work at his place of employment at 71st Street and Harlem Avenue from 11:00 P. m. on July 26, 1972, until 7:00 A.M. on July 27, 1972. He telephoned defendant at the latter's place of employment about 10:30 P.M. on July 26, 1972, and asked him to pick up clothing at an apartment. Defendant arrived at his place of employment at about 11:15 P.M. that night, secured a key from the witness and returned the key about midnight. He did not see defendant for three or four days after the time he returned the key.

On his own behalf, defendant testified that on July 26, 1972, he resided at 6531 South Harvard Avenue in Chicago. He denied raping Esther on that date; but, stated that he had seen her at about 10:30 P.M. on July 22, 1972, the previous Saturday night, when he was washing his automobile in a car-wash in Maywood, Illinois. At that time Esther had been both inside and outside his vehicle.

On July 26, 1972, he was employed at 6051 West 65th Street. He left work at 11:00 P.M. on July 26th, as evidenced by a photocopy of his timecard which was introduced into evidence. He went to Vollie Brent's place of employment at 11:15 P.M. to pick up an apartment key and returned the key to Brent at his place of employment about midnight. After the defendant returned the key to Brent, he went to pick up his wife at her place of employment. He arrived there about 12:40 A.M.

Defendant was questioned extensively on cross-examination concerning his meeting of Esther Crawford at the carwash in Maywood on July 22, 1972, where he had gone "every time" he washed his car. On that date, which was the first and only

time that defendant had seen her until a court appearance in this matter, she had been outside the carwash and had struck up a conversation with him concerning bus service in the area and smoking cigarettes and marijuana. She asked defendant to have sex with her that night. Defendant testified that they eventually had sexual intercourse inside his automobile in a nearby alley behind a police station or a fire station. Thereafter, defendant drove her back to the carwash, where she got out and walked away. The next time he saw her was in a courtroom. Defendant picked his wife up from work every night that she had worked in July, 1972, and he could not recall anyone else bringing her home from work. The court allowed the witness to answer a prosecution question, over a defense objection, as to whether he had engaged in an act of oral copulation with Miss Crawford, and sustained a defense objection to a subsequent prosecution question as to whether he had performed an act of anal sex with her. The court commented to the latter question that the prosecutor was "going far afield now."

Esther Crawford testified in rebuttal that she had not seen defendant at a carwash on July 22, 1972, nor did she have sexual relations with him that night.

The trial court noted that there were time discrepancies in the evidence adduced at trial, and resolved them in light of the fact that Esther Crawford was a "young teenage girl and that she may have been somewhat in error as to her time sequences." The court also specifically found that defendant's account of his first meeting with Esther on July 22nd was incredible and implausible, and that the People corroborated her testimony by introduction of evidence concerning her physical condition and her outcry upon reaching the girlfriend's home; and the license

plate identification which led to defendant's apprehension. The court found defendant guilty of the offense of rape and of indecent liberties with a child, specifically making no finding on the charge of contributing to the sexual delinquency of a child.

Opinion

Defendant contends that he was not proven guilty beyond a reasonable doubt. This contention is founded upon a number of alleged discrepancies in the People's evidence. He argues that testimony of the prosecuting witness was unsatisfactory and improbable because of the "heavily trafficked street" on which she was accosted; because of the one and a half hour drive before the attack; and because of the forced use of a foliage covered spot for the rape in the secluded area where they had stopped. He questions her account of the assault because she stated that defendant accosted her on the street at 11:00 P.M., whereas his uncontroverted evidence was that he had punched out from work at that time. He further questions her account as to the general time sequences involved, stating that she had been wearing a wristwatch. He argues that no evidence was adduced corroborating her statement that she had been with friends at the restaurant prior to the assault and theorizes that she had had sexual relations with her boyfriend that night whereupon, realizing "her dilemma" and remembering her sexual relations with defendant a few nights before, she determined to accuse him of raping her to hide the facts from her parents and to further vent "her hostile feelings toward the black defendant." He also questions whether Mary Branand had been awake and watching television at that hour of the morning, and questions the lack of evidence of what transpired

between the time Esther Crawford had arrived home the following day and the time when the police were called hours thereafter.

As the foregoing summary of the evidence demonstrates, the discrepancies in the evidence raised by defendant are either imaginary or are capable of being satisfactorily resolved by a determination of credibility of the witnesses and the weight to be accorded their testimony. The sole significant factor raised by defendant, as noted by the trial court at the trial, relates to the evidence that he had punched out of work at 11:00 P.M. on July 26, 1972. Esther, however, did not testify that she was accosted by defendant "at" 11:00 P.M., but rather that she had been accosted by him "around" 11:00 P.M. No evidence was adduced indicating that she noticed the time when that particular confrontation occurred. As stated, this factor was for resolution by the trier of fact and was expressly and specifically resolved by the trial court in favor of Esther.

The account of the rape by the 15-year-old victim was clear and convincing, and was further corroborated by independent evidence as to her condition and outcry after the incident; her purse located 22 miles from her home; and the vehicle license plate number which ultimately led to defendant. In fact, defendant testified that he had previously known the victim. Nonetheless, the trier of fact expressly chose not to believe defendant's rather far-fetched story that he had met Miss Crawford the Saturday before the rape, and the court inferentially chose not to believe defendant's testimony that he had picked up clothes for a friend and had picked up his wife from work on the night in question. That was the function and the prerogative of the trial court as the trier of fact. (People v. Mack, 25 Ill.2d 416, 185 N.E.2d 154.). We hold that sufficient evidence was adduced by the People which supported the conviction for rape.

Defendant also contends that he was denied a fair trial because the trial court allowed the prosecutor to question him concerning the nature of the sexual relations he had allegedly engaged in with Esther on the night of July 22, 1972. He maintains that the questions bore directly on the court's finding that his account in that regard was incredible.

Defendant opened this area of questioning on his own direct examination, testifying only that he had met the prosecuting witness on July 22nd and that she had been both inside and outside his automobile. It was proper for the People to elicit the details of the alleged meeting. When the People's questioning concerning the nature of the sexual relations between defendant and Miss Crawford began to exceed proper bounds, and when it thus became apparent to the trial court, the court sustained defendant's objections to the questioning and admonished the prosecutor that he was proceeding out of bounds. Defendant gave negative answers to those questions, and it does not appear that the court gave much, if any, weight to the prosecutor's incursion into that improper territory. The court recognized the questioning for what it was, "far afield." Defendant was in no way prejudiced in this regard. People v. Parisie, 5 Ill. App.3d 1009, 1035, 287 N.E.2d 310; People v. Burris, 49 Ill.2d 98, 104, 273 N.E.2d 605.

The cases cited by defendant in support of his respective contentions are not in point. In People v. Appleby, 104 Ill. App.2d 207, 244 N.E.2d 395, the sole link between defendant and the rape was his residence in the building where the offense took place and the victim's questionable identification of him as the assailant. In People v. Taylor, 48 Ill.2d 91, 268 N.E.2d 865, the evidence failed to disclose that force

was employed in the admitted act of sexual intercourse, in light of such facts that the alleged victim and the defendant held philosophical discussions prior to the act, that she had kissed him goodbye, that there existed no physical signs that force had been used, and the like. In People v. Cage, 34 Ill. 2d 530, 216 N.E.2d 805, the trial court improperly allowed evidence of other crimes to go to the jury, which evidence demonstrated that the defendant had been engaged in other similar but unrelated offenses. The "other offenses" allegedly engaged in by defendant in the instant case existed solely in the questions asked by the prosecution. The questions elicited negative answers from the defendant, and also consisted in part of matters initiated by defendant's own evidence on direct examination.

Considering defendant's argument as a whole, we find no reason to interfere with the trial court's finding of guilty. It is our opinion that defendant was afforded a fair trial and was convicted of the crime of rape beyond a reasonable doubt.

Although not raised by defendant on this appeal, it appears that grounds exist for the vacation of the judgment of conviction entered as to the offense of indecent liberties with a child.

The indictments charged the defendant with the offenses of rape, indecent liberties and contributing to the sexual delinquency of the same victim. After hearing the evidence, summarized above, the trial court found defendant guilty of the offense of rape and the offense of indecent liberties. The court expressly made no finding on the charge of contributing to the sexual delinquency of a child. The facts adduced demonstrate a single forcible act of sexual intercourse by

defendant upon the minor victim, followed later by a solicitation by him to engage in sexual relations. A conviction for indecent liberties must be supported by a physical act of sexual nature, which does not appear from the facts adduced in the instant case apart from the single act of forcible sexual intercourse which constituted the rape. (Ill. Rev. Stat. 1971, ch. 38, par. 11-4) The solicitation to engage in a second act of sexual intercourse which later followed the rape clearly did not constitute the offense of indecent liberties with a child; rather it would fall within the proscriptions contained in section 11-6 of the Criminal Code, dealing with the indecent solicitation of a child and of which the defendant had not been charged. Ill. Rev. Stat. 1971, ch. 38, par. 11-6.

In the recent case of People v. Lilly, ____ Ill.2d ____ (No. 45788, March 20, 1974), the Illinois Supreme Court was faced with an almost identical factual situation, involving a single defendant convicted for the offenses of rape and indecent liberties which arose out of the same set of circumstances and which involved the same victim. The court there reversed an Appellate Court decision upholding the indecent liberties conviction, upon which no sentence had been imposed, and vacated the trial court's judgment as to that conviction. The Supreme Court held that under the circumstances there could arise only one single conviction of crime.

We hold the Lilly case to be controlling in this instance, and we choose to exercise our power under Supreme Court Rule 615(a) (50 Ill.2d 615(a)), relating to plain error. Consequently, the judgment of conviction for the offense of indecent liberties with a child is vacated.

We affirm the judgment of conviction and the sentence imposed for the offense of rape, and vacate the conviction for indecent liberties with a child.

JUDGMENT AFFIRMED AS MODIFIED.

ABSTRACT ONLY.



58455

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	_____
)	
CHARLES TERRY, MOSES HARRIS and)	
THOMAS LOCKHART,	)	HONORABLE
	)	IRWIN COHEN,
Defendants-Appellants.	)	JUDGE PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Charles Terry, Moses Harris and Thomas Lockhart, defendants, were each found guilty after a bench trial of two separate charges of theft in violation of section 16-1(a)(1) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1).) Terry was sentenced to one year at the Illinois State Farm, Vandalia, Illinois on each charge, the sentences to run concurrently. Harris and Lockhart were sentenced to nine months in the Cook County Jail on each charge, the sentences to run concurrently.

Defendants' only argument on appeal is that they did not knowingly and intelligently waive their right to a trial by jury. Since defendants do not challenge the sufficiency of the evidence against them, a detailed recitation of the facts adduced at trial is not necessary.

Opinion

This court has often stated that there is no specific formula for determining whether a defendant's waiver of the

*BARRETT, DRUCKER and LORENZ, J.J. participating

right to a trial by jury is knowingly and understandingly entered. Each case depends upon the particular facts and circumstances of that case. (People v. Richardson, 32 Ill. 2d 497, 207 N.E.2d 453; People v. Wesley, 30 Ill.2d 131, 195 N.E.2d 708; People v. Diesel, 128 Ill.App.2d 388, 262 N.E.2d 15.) However, a lengthy explanation of the consequences of a jury waiver is not a prerequisite to the validity of that waiver. People v. Geary, 8 Ill.App.3d 633, 291 N.E. 2d 13; People v. Bradley, 131 Ill.App.2d 91, 266 N.E.2d 469.

In the case at bar, the record demonstrates the following colloquy regarding a jury trial:

"THE COURT: Mr. Harris, you are charged with two counts of theft.

On each count on a finding of guilty or plea of guilty you can be sentenced from one day to one year in jail and/or fined from \$1 to \$1000; do you understand that?

MR. HARRIS: Yes.

THE COURT: That is on each charge, so you could actually serve two years; do you understand that?

MR. HARRIS: Yes.

THE COURT: Knowing that do you want a jury trial or me to hear the case?

MR. HARRIS: You.

THE COURT: Once you waive your right to a jury you cannot ask for it again once I start hearing the case.

MR. HARRIS: Yes.

THE COURT: How about you, Mr. Terry? You have two counts of theft one by Mr. Castillo and on each one you could be fined from \$1 to \$1000

and from one day to one year in jail, making a total of two years in jail; do you understand that?

MR. TERRY: Yes.

THE COURT: Do you want a jury trial?

MR. TERRY: I want you to hear the case.

THE COURT: The same warning goes to you. Once I proceed you cannot ask for a jury again.

MR. TERRY: Yes.

THE COURT: Mr. Lockhart, you have two counts of theft also, which, on a plea or finding you could be sentenced from one day to one year in jail and fined from -- and/or fined from \$1 to \$1000.

Do you want a jury trial or --

MR. LOCKHART: You.

THE COURT: Once I start hearing the case you cannot ask for a jury.

MR. LOCKHART: Yes, sir.

THE COURT: Jury waived."

In People v. Johnson, 3 Ill.App.3d 158, 279 N.E.2d 47, the defendant was found guilty of arson after a bench trial. On appeal, defendant argued that he did not knowingly and understandingly waive his right to a trial by jury. The transcript demonstrated that when the case was called, the trial judge addressed the defendant:

"THE COURT: Well, we're going to hold you to trial. Mr. Johnson, you wish to waive your right to a jury trial and submit your case to this court?

DEFENDANT: Why don't you have the trial today? I have been having --

THE COURT: I want to ask you now, do you want to be tried by this judge or a jury?

THE DEFENDANT: I will be tried by this one.

THE COURT: Indicate that by signing this jury waiver. Would you sign this jury waiver and you will be tried by me. We will start the case today.

MR. DOWNS (defense counsel): Sign your name right here. (Indicating.) Judge, the defendant has affixed his signature to a jury waiver form."

This court rejected defendant's argument, holding that the above colloquy adequately demonstrated that the waiver of a jury trial by the defendant was knowingly and understandingly entered.

In the case at bar, the record demonstrates that the defendants were represented by the public defender with whom they had conferred prior to the case being called. The trial judge carefully admonished each defendant as to the possible penalties for each of the crimes charged and asked each defendant if he wished a trial by jury or a bench trial. Each of the three defendants unequivocally stated that he wished to waive his right to a trial by jury and be tried by the court. There is nothing in the record to indicate that the defendants did not understand that they had a right to a trial by jury and that they were willing to waive that right. After a review of the entire record, we conclude that the waiver of a jury trial by each of the defendants was knowingly and understandingly entered.

JUDGMENT AFFIRMED.

Abstract Only.



1 201.A. 840^{3D}

57267

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellant,)	
)	
v.)	
)	
JAMES E. WILLIAMS,	)	HONORABLE
	)	ROBERT J. COLLINS,
Defendant-Appellee.	)	PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

The People of the State of Illinois appeal from a judgment which dismissed Indictment 71-1945 covering the alleged armed robbery of Marvin R. Frank because it was issued contrary to Article I, Section 7, paragraph 2, of the Illinois Constitution of 1970.

On April 5, 1974, after service of notice on defendant and the filing of his written consent, an order was entered in this court allowing the withdrawal of the attorney for defendant and, consequently, no brief has been filed on his behalf. However, in accordance with the practice of this court, the appeal will be decided upon its merits. People v. Caruso, 2 Ill. App.3d 80, 276 N.E.2d 112.

The sole issue on appeal is whether under Article I, Section 7, paragraph 2, of the Illinois Constitution of 1970 the defendant has been deprived of his right to a prompt preliminary hearing.

The record discloses that a complaint was filed alleging that on December 22, 1970, the defendant robbed Lucy Bradley of \$87 in violation of Section 18-1 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 18-1). Subsequently the defendant was also charged by complaint with the offense of armed robbery of Marvin R. Frank on March 6, 1971, in violation of Section 18-2 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 18-2).

Sullivan, P.J., Drucker, J., and Lorenz, J., participating.

On April 1, 1971, a preliminary hearing was held before Judge John F. Hechinger for the robbery of Bradley. The court made a finding of probable cause. At this hearing the assistant State's attorney stated: "There's another matter, [the robbery of Frank] this officer here requested [it] be continued to the 28th of April, counsel." The trial court said that "Williams [defendant] indicated to me that he wanted this matter [the Frank robbery] continued with that [the Bradley robbery] because he persists in his innocence on that matter, is that correct?" to which Williams replied, "Well, I wanted to have both tried." Afterwards the court stated, "All right, by agreement, April 28th."

Another hearing was held before Judge Hechinger on April 28, 1971, at which time the State's attorney stated that there was a finding of probable cause after a preliminary hearing on the Bradley robbery; that he and counsel for the defendant had negotiated a plea agreement and that "the defendant wishes to waive his rights to an indictment." After a discussion between the trial court and counsel, the court stated that he had not been informed of the Frank armed robbery charge against the defendant and that he would not go along with the agreement but would permit the defendant to withdraw his plea of guilty. Thereupon the court held defendant over to the Grand Jury.

On July 19, 1971, the defendant was indicted for the armed robbery of Frank.

On October 13, 1971, the defendant filed an affidavit in which he stated that the Frank armed robbery charge was "dismissed for want of probable cause at the April 28, 1971, preliminary hearing."

On November 4, 1971, the defendant filed another affidavit in which he stated that on April 28, 1971, "no preliminary hearing, finding or disposition was made of the charge brought by

Marvin Frank." Also on November 4, 1971, the defendant filed a motion to quash the Frank armed robbery indictment and to discharge the defendant on the ground that the indictment "violated Article I, Section 7, paragraph 2, of the Illinois Constitution of 1970" because "there was no preliminary hearing on said complaint brought by Marvin R. Frank, no finding of probable cause was or could be entered."

On November 23, 1971, a hearing was held on the foregoing motions at which the State offered the defendant an immediate preliminary hearing, which was refused by counsel for the defendant because it would not "cure the violation." The trial court held that the defendant had not had a preliminary hearing on the Frank armed robbery complaint, and since the indictment was returned after July 1, 1971, the effective date of the 1970 Illinois Constitution, the defendant's motion to dismiss the indictment would be sustained.

The State argues that it was error for the trial court to dismiss the indictment on the ground that no preliminary hearing was held since Article I, Section 7, paragraph 2, of the Illinois Constitution of 1970 does not require a preliminary hearing in every case but only requires that the existence of probable cause be promptly determined either by the trial court or by the grand jury. Prior to the adoption of the 1970 Constitution, the courts of Illinois uniformly held that an accused was not entitled to a preliminary hearing as a matter of right and could be indicted directly. People v. Hayes, 52 Ill.2d, 170, 287 N.E.2d 465; People v. Petruso, 35 Ill.2d 578, 221 N.E.2d 276.

Since the adoption of the 1970 Constitution, the Supreme Court has expressly ruled on the question of whether or not the accused is entitled to a preliminary hearing as a matter of right. In People v. Hendrix, 54 Ill.2d 165, 295 N.E.2d 724, there was

some confusion as to the actual date of arrest of the accused, but he was brought before the circuit court on August 18, 1971, and a preliminary hearing was ordered. It appears, however, that the State's attorney took the case directly to the grand jury and the defendant was indicted the next day, August 19, 1971. The defendant filed a motion to dismiss the indictment on the ground that he had been originally charged by a criminal complaint and that he was entitled to a preliminary hearing. The prosecution offered to hold a preliminary hearing "to cure any possible defect," but the public defender rejected the offer stating it would "not cure the defect." (Hendrix at 167.) The Supreme Court held that unless there was an understanding waiver of indictment, a prosecution for a felony had to be by indictment, and that no constitutional right of defendant was violated by failure to have a preliminary hearing.

In People v. Kent, 54 Ill.2d 161, 295 N.E.2d 710, the court stated that the reference in Section 7 of Article I of the 1970 Constitution to a right to a preliminary hearing was a new provision. The court then examined the record of proceedings of the Constitutional Convention and concluded that the history of the evolution of this constitutional provision showed that a defendant could be indicted even if no probable cause was found in the preliminary hearing.

In People v. Spera, 10 Ill. App.3d 305, 293 N.E.2d 656, the court stated that the provision of Article I, Section 7, paragraph 2, of the 1970 Constitution "unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause" is in the alternative, and that by using the word "or" a defendant may be charged by indictment "or" may be given a prompt preliminary hearing.

In People v. Savage, 12 Ill. App.3d 734, 298 N.E.2d 758, the court held that it was not necessary for the prosecution to afford the defendant a "prompt preliminary hearing" under Article I, Section 7, of the Constitution of 1970 and, therefore, it was not error for the defendant to be indicted without a preliminary hearing.

In light of the foregoing it was error for the trial court to dismiss Indictment 71-1945 for the armed robbery of Marvin R. Frank.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Abstract only.

58817



20 I.A. 3d 879

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
MOSES STEELE,)
)
 Defendant-Appellant.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JOHN F. HECHINGER,
Presiding.

PER CURIAM.

Moses Steele, defendant, was convicted upon his plea of guilty of the crime of unlawful use of weapons in violation of Section 24-1(a)(4) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a)(4)). He was sentenced to a term of ten months in the House of Correction. Defendant appeals, arguing that his plea of guilty was coerced by the trial judge's participation in plea negotiations and that the judge did not comply with Supreme Court Rule 402 in accepting his plea of guilty.

Defendant was originally charged with unlawful use of weapons as a felony in that he had been convicted of a felony within five years. On November 14, 1972, when his case was called the trial judge asked the defendant if he wished the court to appoint counsel to represent him, and defendant replied, "Yes, sir. If you like, I'll plead guilty for having the gun." The trial judge rejected defendant's offer and appointed counsel to represent him. After consultation with his attorney a motion to suppress was heard. After the motion to suppress was denied, the trial judge said, "Make him an offer." The State responded that they had offered to reduce the charge to a misdemeanor and to recommend a sentence of one year. Defendant attempted to explain to the judge the reason he was carrying a gun. The judge responded that having a gun concealed on his person is still a violation of the law. When defendant was asked if he wished to

plead guilty he responded in the affirmative. The judge informed defendant that upon his plea of guilty he would sentence him to a term of ten months.

Defendant was then read the complaint under which he was charged. He responded that he understood the nature of it, and the judge informed him that by entering a plea of guilty he would waive his right to a jury trial. Defendant stated that he understood what a jury trial entailed. He was informed of the maximum and minimum possible penalties for the crime charged. He stated that after conferring with the Public Defender and knowing the consequences of his plea he wished to enter a plea of guilty. It was stipulated that the evidence heard on the motion to suppress would be considered on the plea of guilty. Defendant was then sentenced to ten months in the House of Correction.

Defendant's first contention is that his plea of guilty was coerced by the trial judge's participation in the plea negotiations. The rule is now established in this State that the trial judge may participate in plea negotiations and that his participation does not render involuntary the plea of guilty rendered thereafter. (People v. Robinson (1974), 17 Ill.App. 3d 310, 308 N.E. 2d 88.) However, the statute is clear that "the trial judge shall not initiate plea discussions" (Ill. Rev. Stat. 1971, ch. 110A, par. 402(d)(1)).

In the instant case defendant, by his own statement, initiated plea discussions. When his case was first called the trial judge inquired if defendant wished the court to appoint counsel to represent him. He responded that he did wish to enter a plea of guilty. The judge rejected defendant's plea at that time and appointed counsel to represent him. A motion to suppress was then heard and denied. Thereafter, the judge asked if the State wished to make defendant

an offer, and the State responded that on a misdemeanor they had offered defendant one year. The judge informed defendant that on a plea of guilty to the misdemeanor, he would sentence defendant to a term of ten months. Defendant then entered a plea of guilty. Under those circumstances, we conclude that the trial judge did not initiate the plea bargaining and that his actions in no way coerced defendant's plea of guilty. Defendant was no stranger to legal process. His choice was to have his case held to the grand jury as a felony or to plead guilty to a reduced misdemeanor charge for a sentence of ten months. The fact that he chose to plead guilty to a reduced misdemeanor charge does not in any way indicate that his plea was not voluntarily entered.

Defendant's second contention is that the trial court failed to comply with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) in accepting his plea of guilty in that the judge did not determine that the plea of guilty was voluntary and failed to inform defendant of his right to a bench trial or of his right to confront witnesses against him. Supreme Court Rule 402 sets forth the procedure which must be followed by the trial court in accepting pleas of guilty. However, the Rule requires only substantial compliance with its terms. (People v. Reed (1971), 3 Ill.App. 3d 293, 278 N.E. 2d 524.) The Illinois Supreme Court has indicated a realistic approach to the construction of the Rule. People v. Mendoza (1971), 48 Ill. 2d 371, 270 N.E. 2d 30.

Here, defendant was represented by counsel with whom he had conferred prior to the case being called. He understood that he was entering a negotiated plea of guilty to a reduced charge in order to receive a specific sentence. The charge was carefully read to defendant and he stated that he understood the nature of the charge against him.

He was specifically admonished that he had a right to a trial by jury, and he stated that he understood what a jury trial entailed. He was also admonished as to the maximum and minimum possible sentences. Defendant stated that after conferring with his attorney and understanding all of his rights he still wished to enter a plea of guilty. Under those circumstances, we conclude that the admonishments by the trial judge were sufficient to constitute substantial compliance with Supreme Court Rule 402. People v. Mendoza, supra; People v. Battle, ___ Ill.App. 3d ___, ___ N.E. 2d ___ (No. 58521, May 20, 1974); People v. Tennyson (1972), 9 Ill.App. 3d 329, 292 N.E. 2d 223.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

THIRD DIVISION:

Justice Dempsey did not participate.

Bar 12-2-71

20 I.A. 3D 888



59332

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
)	
BORIS FLOWERS,)	
)	
Defendant-Appellant.	)	Earl E. Strayhorn, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The defendant, Boris Flowers, was found guilty of aggravated battery and was sentenced to a term of not less than four and not more than ten years in the penitentiary.

Flowers contends that prejudicial testimony about a pistol found in his possession when he was arrested, which could not have been used to commit the offense charged, was improperly admitted into evidence and considered by the court which tried the case without a jury. He also asserts that he was not proven guilty beyond a reasonable doubt and that his minimum sentence was excessive under the Unified Code of Corrections.

On the evening of December 8, 1971, at about 7:10 p.m., several youths including James and Willie Applewhite, were standing in a Chicago playground. Willie Applewhite testified that he heard a gun being fired, was shot in the shoulder and fell to the ground. His brother, James, testified that he heard the shots and dropped to

the ground. Then he looked up to where he thought the shots were coming from and saw Flowers, whom he knew, firing a rifle from the fifth floor of a nearby apartment building. He said that Flowers was hanging out the window, that the lights were on in the room and that there were lights at the top of the building and below. The shape of Flowers' hair helped James to recognize him. On cross-examination, he said that he did not recall testifying at a preliminary hearing that the lights were not on in the room when he first saw the defendant.

Police Officer James Dvorak testified that he was told by another officer that Flowers was apprehended for an armed robbery offense. When the defense objected to that testimony, the trial court did not rule on the objection because the prosecutor immediately instructed the witness not to repeat what anyone else told him.

Officer Ernest Cain testified that at the time he arrested Flowers, he was carrying a pellet gun. Cain's testimony was objected to as irrelevant for the reason that the pellet gun could not have been used to commit the offense for which the defendant was being tried. The objection was overruled.

The fact that the defendant was in possession of a pellet gun at the time of his arrest was properly admitted as evidence of the circumstances of the arrest. People v. Durkin (1928), 330 Ill.394, 161 N.E. 739. The circumstances of an arrest are admissible including testimony about weapons found in a defendant's control even though such weapons could not have been used to commit the offense charged.

People v. Moore (1969), 42 Ill.2d 73, 246 N.E.2d 299, rev. in part on other grounds, 408 U.S. 786 (1972). The facts in this case are distinguishable from those in People v. Kimbrough (1970), 131 Ill.App. 2d 36, 266 N.E.2d 431, cited by the defendant, because the pellet gun was not admitted into evidence nor did the State attempt to introduce it into evidence.

Because of the prompt correction by the prosecutor, the court did not pass on the objection to the volunteered statement of Officer Dvorak that he had been told that Flowers was arrested for armed robbery. Inadmissible evidence which might be regarded as prejudicial in a jury trial is not so regarded in a non-jury trial where the court is presumed to consider only admissible evidence in reaching its decision. People v. DeGroot (1969), 108 Ill.App.2d 1, 247 N.E.2d 177. Although the court did not overrule the defendant's objection it cannot be presumed that the court considered Dvorak's statement.

The defendant asserts that the evidence was insufficient to prove him guilty beyond a reasonable doubt because the only testimony connecting him to the crime was the testimony of James Applewhite, and that that testimony lacked credibility because it contradicted a statement made by the witness at the preliminary hearing that the lights were not on in the window. He also points to Applewhite's testimony that he recognized the defendant by the shape of his hair as being incredible.

It is the function of the trial court judge to determine the credibility of the witnesses and the court determined that the testimony of James Applewhite was credible. Reviewing courts do not substitute their opinion of the credibility of witnesses unless the trial court's assessment was obviously erroneous. People v. Ashford (1974), 17 Ill.App.3d 592, 308 N.E.2d 271. The testimony of one credible witness is sufficient to convict. People v. Smith (1970), 121 Ill.App.2d 105, 257 N.E.2d 261.

The State admits that pursuant to the Unified Code of Corrections, Ill.Rev.Stat., 1973, ch. 38, para. 1005-8-1(c)(4), the defendant's minimum sentence should be not more than one-third of his maximum sentence and that the four-year minimum sentence imposed on him should therefore be reduced.

The judgment is affirmed and the minimum sentence of the defendant is reduced to three years and four months.

Affirmed as modified.

McGlooin and Mejda, JJ., concur.

20 I.A. 889



No. 59737

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY.
MICHAEL CHAVERS,)	HONORABLE
Defendant-Appellant.)	IRWIN COHEN,
	PRESIDING.

PER CURIAM:

Michael Chavers, defendant, was found guilty after a bench trial of the offense of unlawful use of weapons, in violation of section 24-1(a)(4) of the Criminal Code, and was sentenced to a term of 90 days in the House of Correction. (Ill.Rev.Stat. 1973, ch.38, par.24-1(a)(4).) The public defender of Cook County was appointed as counsel for defendant on this appeal and has filed a motion, supported by a brief, for leave to withdraw as appellate counsel pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, on the ground that the appeal is frivolous and without merit. Defendant was advised of appellate counsel's motion and copies of the motion and brief were forwarded to him by the court. Defendant was allowed three months to file any points he desired to support the appeal; he has not responded.

The criminal complaint filed against defendant charged him with the offense of unlawful use of weapons in that he carried a concealed .38 caliber revolver. He filed a motion to suppress the weapon as evidence. At the hearing on that motion, it was brought out that the arresting officers had received a radio communication at about 2:25 P.M. on August 6, 1973, that three men were in the street with guns at 6918 South Dante Avenue in Chicago; the officers arrived at the scene about one minute later and observed the defendant and two companions at that location, one of whom was wearing yellow trousers. Those three men were the only persons on the street;

the sole item of wearing apparel contained in the radio description of the men was that one was wearing yellow trousers. The defendant and his companions were made to place their hands against the car, and a pat-search of their persons disclosed a .38 caliber revolver at defendant's hip, inside an open sweater; the officers had no warrant for the search or arrest of the defendant at the time, nor did they observe him in the violation of any laws.

It was also brought out at the hearing on the motion to suppress that one of defendant's companions, Larry Carr, had been engaged in an argument with Marshall Johnson at the 6918 Dante location, while the defendant and the other companion were across the street; the police arrived as the latter two men were preparing to leave the scene. Neither the defendant nor his companions had threatened Johnson with a gun, and the gun in question was not exposed until the police arrived and confiscated it.

It was brought out at the trial of the case that the defendant and his companions were stopped and searched across the street from the location broadcast in the radio communication, and that the defendant told the officers that he was carrying the gun because he was employed as a security guard and had gotten off work about an hour before. The officers telephoned defendant's alleged employer and learned that defendant had not been so employed since January of that year. Defendant denied that he told the officers that he was then employed as a security guard, and stated that he told them that he had been seeking employment as a guard on that date and that he had taken his weapon with himself to show his prospective employer that he had his own equipment; he testified that the reason the weapon was inside his trousers was because the paper bag in which he had originally carried the gun had broken and that he had no reason to conceal the weapon.

Appellate counsel has raised three issues in the brief in support of his motion to withdraw, which he states may be advanced as grounds for appeal but which he concludes are without merit and unsupportive of the instant appeal: I, whether the trial court properly denied defendant's motion to suppress; II, whether defendant's possession of the gun fell within the statutory exemption granted to security guards; and III, whether defendant was proven guilty beyond a reasonable doubt. Upon review of the instant record, we agree with appellate counsel's conclusion that those issues are without merit.

The arresting officers had probable cause to stop and search the defendant and his companions. The officers received a call of an offense involving guns on the street; they arrived at the described location within a minute of the call; they observed the defendant and his companions as the only three persons on the street; and one of the three men was wearing clothing matching that contained in the description given in the call. The officers, faced with the probability that the three men were armed, properly searched the men for their own protection. The motion to suppress was correctly denied.

Nor would defendant qualify as an exempt person under section 24-2(a)(4) of the Criminal Code. The arresting officer testified that he determined that defendant was not employed as a security guard on the date of the arrest; defendant himself testified that he was not then so employed, but only that he was seeking employment in that regard. See Ill.Rev. Stat. 1973, ch.38, par.24-2(a)(4).

Finally, the evidence was sufficient for the trier of fact to have found defendant guilty beyond a reasonable doubt of the offense of unlawful use of weapons, by carrying a concealed weapon. The arresting officer testified that the

.38 caliber revolver was found inside the defendant's belt, under a sweater. Defendant admitted possession of the weapon, but stated that he had no reason to conceal the weapon; such was a matter for resolution by the trier of fact.

In discharge of our duty under the Anders decision, we have reviewed the instant record and have found no additional grounds which may be raised to support an appeal in this case. We are of the opinion that any issue raised from the instant record would be without merit, and that the appeal is therefore frivolous. The public defender of Cook County is accordingly allowed to withdraw as counsel for defendant on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed.
Judgment affirmed.

Third Division. Mr. Justice Dempsey did not participate.



30
20 I.A. 890

58116)
) Consolidated
58117)

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	_____
)	
EDDIE FORD,	)	HONORABLE
	)	ROBERT J. DOWNING,
Defendant-Appellant.	)	JUDGE PRESIDING.

PER CURIAM* (FIFTH DIVISION, FIRST DISTRICT):

Defendant was originally charged by Indictment #69-3742 with three counts of armed robbery and two counts of aggravated battery (Ill.Rev.Stat. 1969, ch. 38, pars. 12-4, 18-2), and by Indictment #70-3540 with jumping bail. (Ill.Rev.Stat. 1969, ch. 38, par. 32-10.) On May 4, 1971, he entered a plea of guilty to both indictments. He was sentenced to probation for a period of five years with the condition that the first year be served in County Jail on each charge, the sentences to run concurrently.

On July 5, 1972, a hearing was held on a rule to show cause why defendant's probation should not be terminated based upon the fact that defendant had subsequently been convicted of robbery (Indictment #72-290). At the hearing on the rule to show cause, defense counsel, in defendant's presence, stipulated that defendant had in fact been subsequently convicted of robbery and sentenced to a term of eight to sixteen years. Thereafter, Melvin Williams, defendant's probation officer, was sworn to testify and was examined by the trial judge. Williams stated that since defendant was placed on probation on May 4, 1971, he reported to the probation office on only one occasion.

*BARRETT, DRUCKER and LORENZ, J.J.
participating

Defendant stated that he was unemployed at that time. At the conclusion of the hearing, the trial court revoked defendant's probation and after a hearing in aggravation and mitigation, sentenced him to a term of eight to sixteen years on Indictment #69-3742, charging armed robbery and aggravated battery, and one to five years on Indictment #70-3540, charging bail jumping, the sentences to run concurrently with each other and with the previously imposed sentence on Indictment #72-290.

Defendant's first contention is that the trial court's acceptance of his admission through counsel of the violation of probation without prior admonishment under Supreme Court Rule 402 (Ill.Rev.Stat. 1971, ch. 110A, par. 402), constitutes reversible error. This court has recently rejected this same argument, holding that Supreme Court Rule 402 is not applicable to probation revocation hearings. People v. Wilhite, ___ Ill. App.3d ___, ___ N.E.2d ___ (#59251, decided March 18, 1974); People v. Hall, 17 Ill.App.3d 477, 308 N.E.2d 235; People v. Beard, 15 Ill.App.3d 663, 304 N.E.2d 707; People v. Collins, 14 Ill.App.3d 446, 302 N.E.2d 709.^{1/}

Defendant's second contention is that the trial court erred in soliciting information from Williams, the probation officer, as to other grounds for revocation of probation not contained in the rule to show cause. Defendant urges that the trial judge erred when he questioned Williams as to the

^{1/} The question of whether Supreme Court Rule 402 is applicable to probation revocation hearings is presently before the Supreme Court. The Beard case is now pending before the Supreme Court, leave to appeal allowed January 30, 1974 (#46317). The Hall case is currently on leave to appeal in the Illinois Supreme Court, having been filed in the May, 1974 Term (#46614).

fact that defendant failed to report to the probation department and was unemployed. The rule to show cause alleged that defendant violated the terms of his probation in that he had been subsequently convicted of robbery. The evidence presented at the hearing on the rule to show cause showed that defendant, after being placed on probation, had been convicted of the crime of robbery. Defendant's conviction for the crime of robbery was clearly a violation of the terms of his probation. (Ill. Rev.Stat. 1971, ch. 38, par. 117-2(a)(1); People v. Lee, 5 Ill. App.3d 421, 283 N.E.2d 740.) In his finding, the trial judge expressly relied upon this ground:

"He (defendant) was thereafter indicted and found guilty for a violation in connection with 72-290.

The court will, based upon the finding of guilty and the judgment entered on the verdict and the sentence that was imposed, enter a finding of violation of probation in 69-3742 and in 70-3540."

In the case at bar, the trial judge's solicitation of information regarding other conduct was harmless in view of the clear evidence of defendant's conviction for robbery and the trial judge's reliance thereon.

Defendant's third contention is that he is now being imprisoned for an offense of which he has not been found guilty. The basis of defendant's argument is that after a violation of his probation, he was sentenced under Indictment #69-3742 to a term of eight to sixteen years for armed robbery and aggravated battery, while the common law record shows that under Indictment #69-3742 he was convicted only of robbery. We reject that contention. Indictment #69-3742 charged the defendant with three counts of armed robbery and two counts

of aggravated battery. The report of proceedings demonstrates that on May 4, 1971, after a pretrial conference, defendant indicated a desire to plead guilty to the indictment. At that time, defendant was specifically advised that the indictment charged him with three counts of armed robbery and two counts of aggravated battery. Defendant was advised of the possible penalties for each of the charges of armed robbery and aggravated battery, and was informed that the sentences on each count could be consecutive or concurrent. Defendant persisted in his plea of guilty, which was accepted. Defendant was found guilty "in the manner and form as charged in each of these indictments." Defendant was placed on probation and was specifically advised that if he violated probation, he could be sentenced to the statutory terms for armed robbery and aggravated battery. The common law record demonstrates that on May 4, 1971, defendant entered a plea of guilty and was found "guilty of the crime of robbery in the manner and form as charged in the indictment in this cause."

The common law record ordinarily imports veracity. However, when other facts appear in the report of proceedings which are contradictory, a reviewing court must consider the matter on the basis of the record as a whole. (People v. Williams, 27 Ill.2d 327, 189 N.E.2d 314; People v. Caruth, 4 Ill.App.3d 527, 281 N.E.2d 349.) After a complete review of the common law record and the report of proceedings, we conclude that they sufficiently demonstrate that under Indictment #69-3742 defendant was found guilty of three counts of armed robbery and two counts of aggravated battery.

Defendant's fourth contention is that his sentence is excessive under the Unified Code of Corrections. Since defendant's case has not yet reached the stage of final adjudication, the Unified Code of Corrections is applicable. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1; People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Here, under Indictment #69-3742 defendant was sentenced to a term of eight to sixteen years on the charge of armed robbery. The Unified Code of Corrections provides that armed robbery is a Class 1 felony. (Ill.Rev.Stat. 1973, ch. 38, par. 18-2.) For a Class 1 felony, the maximum term is any term in excess of four years (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(b)(2)), and the minimum term is four years unless the court, having regard for the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term. (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(c)(2).) Defendant's sentence of eight to sixteen years for armed robbery is proper under the Unified Code of Corrections.

On revocation of probation the defendant was sentenced to a term of one to five years on Indictment #70-3540 for jumping bail. The Unified Code of Corrections provides that jumping bail, in connection with a felony charge, is a Class 4 felony. (Ill.Rev.Stat. 1973, ch. 38, par. 32-10.) For a Class 4 felony, the maximum term is any term in excess of one year and not exceeding three years (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(b)(5)), and the minimum term is one year in all cases. (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1(c)(5).) Here, defendant's maximum sentence is excessive under the Code and must be reduced to a term of three years.

Defendant's final argument on appeal is that under the Unified Code of Corrections, he is entitled to a sentence credit for the time spent on probation. Section 1005-6-4 of the Unified Code of Corrections (Ill.Rev.Stat. 1973, ch. 38, par. 1005-6-4), provides:

"Resentencing after revocation of probation or of conditional discharge shall be under Article IV *** time served on probation or conditional discharge shall be credited against a sentence of imprisonment or periodic imprisonment."

By the express terms of this section, the defendant is entitled to a credit for the time served on probation. (People v. Schreiber, __ Ill.App.3d __, 304 N.E.2d 686; People v. Kelly, 16 Ill.App.3d 559, 306 N.E.2d 638.) The Unified Code of Corrections provides the court clerk shall transmit to the department or other agencies the number of days the defendant has been held in custody for which he is entitled to a credit. (Ill.Rev.Stat. 1973, ch. 38, par. 1005 4-1(b)(3).) There is no comparable provision for notifying the department of the amount of time served on probation to enable administrative application of such credit as provided in paragraph 1005-6-4(h). It is therefore necessary for us to remand to the trial court with instructions to determine the amount of time spent on probation and issue an amended mittimus to reflect this time served.

In view of the foregoing, the trial court's revocation of probation and sentencing under Indictment #69-3742 is affirmed and the cause is remanded for resentencing under Indictment #70-3540 and to determine defendant's sentence

58116)
58117) Consolidated

credit for the time spent on probation and to issue an amended mittimus to conform with such determinations.

AFFIRMED IN PART AND REMANDED IN
PART WITH DIRECTIONS.

ABSTRACT ONLY.

Barless

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20 I.A. 900



59391

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
ROOSEVELT BRIDGES,)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY.

HONORABLE
ROBERT A. MEIER III,
PRESIDING.

PER CURIAM * (First Division, First District):

Roosevelt Bridges, defendant, was charged by indictment with the crimes of rape and robbery in violation of Sections 11-1 and 18-1 of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, pars. 11-1 and 18-1). After a bench trial, defendant was found guilty of robbery and was sentenced to a term of one to three years. Defendant appeals, arguing (1) that the evidence was insufficient to establish his guilt beyond a reasonable doubt because there was no evidence of force or intimidation and because the testimony of the complaining witness was improbable, unconvincing and contrary to human experience, and (2) that his sentence is excessive and should be reduced to a term of probation.

At trial, Barbara Robinson testified that on February 2, 1972, at approximately 1:00 p.m., she was leaving her apartment at 1439 E. 67th Street when she paused in the hallway to put on her daughter's coat. She observed the defendant standing outside the apartment next door. She proceeded down the stairs and in the lobby of the building she saw the defendant standing with telephone books in his hand. Defendant asked if she wanted a telephone book and she replied that she already had one. Defendant threw the books to the floor and said, "This is a stickup." Miss Robinson tried to go out the door but defendant grabbed her arm and said, "You got any money?" When she replied that she did not have any money, defendant put a hard object into her back and forced her up the stairway and into her apartment. Defendant ordered Miss Robinson to leave her daughter

* Mr. Justice Burke did not participate.

at the front of the apartment and directed her to go into the bedroom. Defendant again requested money and Miss Robinson stated that she did not have any. Defendant then ordered her to disrobe. When she did not comply, the defendant repeated his order several times. Miss Robinson testified that she began to take her clothes off and defendant pulled her pants down and ordered her to lay across the bed, face down. Defendant then forced her to have intercourse with him. Upon hearing Miss Robinson's daughter cry, defendant ordered her to bring the child into the bedroom. When she returned, defendant again forced her to have intercourse with him. Defendant searched the bedroom and took \$30 and some food stamps out of one of the drawers. Defendant then began to search the front room of the apartment. Defendant returned to the bedroom with a butcher knife, put it to Miss Robinson's back and told her that if she got up he would kill her. After a short time, Miss Robinson got up and found that the defendant had left the apartment. Missing from the living room was her record player and \$60 that was inside the record player. Miss Robinson called the police and told her neighbor, Miss Jackson, what had happened. The police arrived and Miss Robinson told them what had occurred. The police took her to Billings Hospital. Approximately two weeks later, she was waiting for a bus when she observed the defendant walking on the street. She stopped police officers and identified the defendant as the man who had attacked her.

Katie Jackson testified that she lived at 1439 E. 67th Street, next door to Barbara Robinson. On February 2, 1972, between 12:00 and 1:00 p.m., defendant came to her door and told her that he was delivering telephone books. While she was talking to defendant, Barbara Robinson came out of her apartment with her daughter. After defendant saw Barbara Robinson, he walked down the stairs toward the lobby. Approximately one hour later, Barbara Robinson came to her apartment, crying and shaking. Miss Robinson told her that the man

with the telephone books put an object into her back and forced her to go up to her apartment where he raped her.

Raymond Binkowski, a Chicago Police Officer, testified that on February 2, 1972, at approximately 1:10 p.m., he responded to a call and proceeded to 1439 E. 67th Street, Chicago, Illinois. There he interviewed Barbara Robinson who informed him that a man approached her in the lobby of her building and demanded money. The man put a hard object into her back and forced her upstairs into her apartment. The man again demanded money and threatened her life with a butcher knife. Miss Robinson stated that the man had raped and robbed her. She gave a detailed description of the offender and was taken to Billings Hospital. Officer Binkowski testified that Miss Robinson was very upset.

Bernadette Kwak, the microanalyst for the Chicago Police Crime Laboratory testified that she examined the vagina swabs taken from Barbara Robinson at Billings Hospital. Her tests proved positive for the presence of spermatozoa.

It was stipulated that if Dr. Shaboishan Quoia were called to testify, he would testify that on February 2, 1972, he examined Barbara Robinson at Billings Hospital. His examination revealed no trauma, no vaginal lacerations and no sperm present.

Roosevelt Bridges, defendant, testified that during January, 1972, he met Barbara Robinson on 63rd Street. Miss Robinson offered to have sexual intercourse with him for \$25. Defendant testified that he agreed and went to Miss Robinson's apartment. After having intercourse with her, defendant testified that he paid her only \$8. Miss Robinson became very angry and told him that unless he paid all the money, she was going to make trouble for him. Defendant denied that he ever raped or robbed Miss Robinson. He stated that on February 2, 1972, at about noon he was at the Hippodrome Night Club.

Maurice Delphie, a friend of the defendant, testified that on February 2, 1972, between 11:30 a.m. and 1:30 p.m., he was drinking with the defendant at the Hippodrome Night Club.

The attorney representing defendant testified that on February 19, 1973, he telephoned Miss Robinson's apartment. A woman answered the phone and identified herself as Barbara Robinson. Miss Robinson told him that during the incident, her portable record player and \$40 were taken. Miss Robinson stated that nothing else was taken from her apartment.

Defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because there was no evidence of the use of force or intimidation. Defendant was convicted of robbery which is defined as the taking of "property from the person or presence of another by the use of force or by threatening the imminent use of force" (Ill.Rev.Stat. 1971, ch. 38, par. 18-1). The use of force or intimidation is the crux of the charge of robbery and distinguishes it from theft. People v. Howell, 11 Ill.App.3d 391, 296 N.E.2d 760.

Here, Barbara Robinson testified that defendant approached her in the lobby of her building and announced a stickup. Defendant grabbed her arm, put a hard object into her back and forced her upstairs into her apartment. Defendant searched her bedroom and took money from one of the drawers. Defendant threatened her with a butcher knife and took a record player and money from the living room. This evidence was sufficient for the trial judge to conclude that defendant took property from Barbara Robinson through the use of force and intimidation. People v. Brown, 76 Ill.App.2d 362, 222 N.E.2d 227.

Defendant's second contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the testimony of the complaining witness was improbable, unconvincing and contrary to human experience. The rule has often been stated that in a bench trial, it is the duty of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to leave a

reasonable doubt of defendant's guilt will the finding of the trial court be disturbed. (People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.) The testimony of a single witness is sufficient to convict if the testimony is positive and the witness credible, even though it is contradicted by the defendant. People v. Stringer, 52 Ill.2d 564, 289 N.E.2d 631.

In the case at bar, the testimony of Barbara Robinson was positive and credible. She testified that she was approached by the defendant in the lobby of her building. Defendant announced a stickup, put a hard object into her back and forced her into her apartment. Defendant took money and a record player from her apartment. During the incident, defendant threatened her with a butcher knife. Minor inconsistencies or discrepancies, such as those pointed out by the defendant in the case at bar, affect only the credibility of the witness which is a matter for the trier of fact to determine. (People v. Bell, 53 Ill.2d 122, 290 N.E.2d 214.) The fact that Robinson did not cry out for help as defendant was returning her to her apartment is understandable since defendant had a hard object which she believed to be a weapon stuck into her back. The fact that Miss Robinson did not attempt to stop the defendant from taking her property is also understandable in view of the fact that she believed defendant had a weapon and the fact that during the incident, defendant threatened her with a butcher knife. Further, Miss Robinson's testimony was corroborated by that of Miss Jackson who identified the defendant as the man who came to her door delivering telephone books at the time Miss Robinson came out of her apartment. Miss Jackson also testified that after the incident, Miss Robinson came to her apartment very emotionally upset and told her that the man with the telephone books had attacked her. The police were promptly called and Miss Robinson told them that she had been raped and robbed. She gave the police a detailed description of the offender. Several weeks after the incident, Miss Robinson observed the defendant on

the street and immediately summoned police officers, who arrested the defendant. The trial judge, after seeing and hearing all of the evidence, found the evidence sufficient to establish defendant's guilt beyond a reasonable doubt. After a complete review of the record before us, we cannot say that the evidence was so unsatisfactory as to leave a reasonable doubt as to defendant's guilt.

Defendant's final contention on appeal is that his sentence is excessive. Defendant asks this court to reverse and remand with directions that he be placed on probation. The granting of probation rests within the discretion of the trial court and the trial court's determination is subject to review only to the extent of ascertaining whether the trial court did, in fact, exercise discretion or whether it acted in an arbitrary manner. People v. Saiken, 49 Ill.2d 504, 275 N.E.2d 381; People v. Vincson, 15 Ill.App.3d 934, 305 N.E.2d 671.

In People ex rel. Ward v. Moran, 54 Ill.2d 552, 556, 301 N.E.2d 300, the Illinois Supreme Court reviewed the authority of reviewing courts to reduce a penitentiary sentence to probation under Supreme Court Rule 615 (Ill.Rev.Stat. 1971, ch. 110A, par. 615). The court held:

"After review of this court's decisions and consideration of the statutory authority entrusted to the trial court, we hold that our Supreme Court Rule 615 was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation."

In the case at bar, the trial judge held a hearing in aggravation and mitigation, after which he imposed a minimum penitentiary sentence upon the defendant. Considering the facts adduced at trial and during the hearing in aggravation and mitigation, we do not believe that the trial court acted in an arbitrary manner in denying defendant's application for probation.

Accordingly, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.



PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
 vs.)
)
 ANGEL RIVERA,) HONORABLE EARL E. STRAYHORN,
) Presiding.
 Defendant-Appellant.)

MR. JUSTICE STAMOS delivered the opinion of the court.

On March 27, 1972, defendant, Angel Rivera, pleaded guilty to two charges of armed robbery. (Ill. Rev. Stat. 1971, ch. 38, par.18-2(a).) He was sentenced to five years probation with the first year to be served in the House of Correction pursuant to the Work Release Program (Ill. Rev. Stat. 1971, ch. 75, par. 35 et seq.).

On April 24, 1972 defendant failed to report to the House of Correction. On May 17, 1972 defendant's probation officer notified the court of defendant's absence from the House of Correction Work Release Program, and thereupon a warrant for his arrest was issued. Defendant was taken into custody on December 21, 1972, and on December 27, 1972 a public defender was appointed for him. On that date the court issued a Rule to Show Cause why defendant's probation should not be terminated.

On January 5, 1973 a hearing was conducted on the Rule to Show Cause. Martin Schneider, the coordinator of the Cook County Work Release Program, testified that the business records of the Program indicated that defendant left the House of Correction on April 24, 1972 and that he had not returned since that date; that defendant had not been given permission for such absence; and that a warrant was issued for his arrest. Mr. Schneider also testified that defendant signed a form acknowledging the rules and regulations of the Work Release Program, including the first article which read:

"You are to go directly to and from the House of Correction to your place of employment or where you are seeking employment. You are not allowed to go home."

Defendant testified that on April 23, 1972 he had been to

the House of Correction hospital. When he left for work on April 24th, he had chest pains and a fever. He became delirious and did not know where he went that day, but he arrived at his brother's house by cab. He remained there for a few days and then his parents took him to the hospital. While he was hospitalized "I had told them, the people, to try to contact the House of Correction but they didn't contact anyways." When he left the hospital, he returned to his brother's house. He did not return to the Work Release Program because an attorney told him that he had already violated his probation and "anyways I was scared and didn't return back." On cross-examination defendant testified that after he was released from the hospital he lived with his brother part of the time and worked. He admitted that he was aware that he was required to return to the House of Correction every day after work.

Defendant introduced into evidence hospital records showing that he was hospitalized for pneumonia from May 3 until May 10, 1972. The court stated that the hospital records proffered by defense counsel indicated that during defendant's period of hospitalization, he was treated for drug addiction in addition to pneumonia.

Defendant also stated to the court that when he was arrested in December of 1972 on an unrelated matter, he volunteered the information to the police that he was absent without leave from the Work Release Program. The court then terminated defendant's probation, and after a hearing in aggravation and mitigation sentenced defendant to concurrent terms of 5 to 10 years in the penitentiary.

Defendant initially contends that the State did not prove that he wilfully absented himself from the Work Release Program, and therefore, that the State did not prove a violation of probation by a preponderance of the evidence.

A violation of probation must be proved by a preponderance of the evidence. (People v. Crowell, 53 Ill.2d 447, 292 N.E.2d 721.) Termination of probation is a question which rests in the sound

discretion of the trial court, and his decision will not be over-
turned absent a clear showing of abuse. People v. Brooks, 14
Ill.App.3d 93, 302 N.E.2d 244; People v. Henderson, 2 Ill.App.3d
401, 276 N.E.2d 372.

At the conclusion of the evidence in the case at bar the court
stated:

"You deliberately left the program and even if I gave
you the benefit of the doubt that you were ill because
the record indicates that you didn't go to the hospital
until May 3rd which was some 10 or 11 days after your
being AWOL ***.

Furthermore, after your release from the hospital you
made no attempt to return to the house of correction and
explain your absence. You made no attempt to give your-
self up. You waited until you were arrested and I'm not
impressed by the fact that you told the officer that you
were AWOL when you were arrested."

The evidence presented clearly supports the court's findings.

Defendant's "excuse" that he did not return to the program because
he was "scared" does not alter the fact that he was aware of his
obligation to return to the House of Correction and deliberately
made no attempt to return. Under these circumstances the State
proved a violation of probation by a preponderance of the evidence,
and the trial court acted well within the bounds of reasonable dis-
cretion in revoking defendant's probation. See People v. Jones,
12 Ill.App.3d 958, 299 N.E.2d 336; People v. Henderson, supra.

Defendant's second contention is that the trial court denied
him the right to counsel of his own choice. Defendant alleges
that the trial court "chilled the attempt of the Public Defender to
ascertain if defendant had or wanted private counsel." The following
colloquy ensued when the cause was called:

The Court: We are here on a hearing for revocation of
probation.

Defense Counsel: Your Honor, I thought I saw the defendant
talking to a private lawyer in the lock-up
so I wonder if he is going to be represented
by private counsel.

The Court: Is the State ready.

Defense Counsel: I believe the private counsel was talking to
the defendant. I wonder if he might be around.

The Court: You are counsel of record, Mr. Lincoln.
 You were appointed to represent Mr. Rivera
 on the representation that he had no funds
 to secure private counsel. We will proceed.
 Swear the witness.

A revocation of probation proceeding is a crucial stage in a criminal action and defendant is entitled to counsel. (Mempa v. Rhay, 389 U.S. 128.) This right to counsel includes the right to be represented by counsel of one's choice. (People v. Green, 42 Ill.2d 555, 248 N.E.2d 116; People v. McArthur, 2 Ill.App.3d 1077, 278 N.E.2d 530.) The voluntary appointment by the court of a public defender cannot operate to deprive defendant of his right to choose private counsel when such right is asserted by a motion to substitute attorneys. People v. Cohen, 402 Ill. 574, 85 N.E.2d 19.

The record in the case at bar indicates that the court appointed a public defender for defendant on December 27, 1972. The public defender filed his appearance as attorney of record on January 2, 1973, and the hearing commenced on January 5, 1973. Defendant made no motion to substitute attorneys, made no motion for a continuance in order to procure private counsel, and made no statement that he, in fact, desired a change of attorney. Defendant gave the court no indication that he was dissatisfied with the public defender who had filed his appearance on January 2nd -- 3 days prior to the hearing. Under these circumstances the court was not required to inquire further as to the speculation indulged in by the public defender. In addition, we note that the record indicates no prejudice to defendant. The public defender was prepared and defendant cooperated with him in his defense. Therefore, we conclude that the trial court did not "chill" defendant's right to counsel. Defendant never asserted this right, and the court did not abuse its discretion in proceeding with the hearing.

For these reasons the judgment of the trial court terminating defendant's probation is affirmed.

A F F I R M E D.

LEIGHTON and DOWNING, JJ., concur.

PUBLISH ABSTRACT ONLY.



No. 58818

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
JAMES DICKEY,	)	DANIEL J. WHITE,
Defendant-Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

James Dickey, defendant, was charged with theft and criminal damage to property. The charges arose from certain events on September 20, 1972 at a Walgreen Drug Co. drug store in the City of Chicago. During a bench trial the court dismissed the theft charge but found the defendant guilty of criminal damage to property and sentenced him to one year in the House of Correction.

On appeal the defendant raises the sole question of whether the evidence supported the conviction for criminal damage to property.

At approximately 11:14 P.M. on Sept. 20, 1972, according to the testimony of Chicago police officer Miller, he and his partner, police officer McDonald, arrived at a Walgreen's Drug Store located at 1558 W. 63rd Street, where they saw defendant emerging from the store's broken window carrying three clock radios. The officer identified the defendant in court and stated that, just after they had placed the defendant under arrest, another person came out of the store through the same broken window. The officer further testified that he and his partner entered the store "much later" and observed that the inside of the store was "just shambles, disarrayed" -- the front window was broken, there was glass outside and some inside the store, cases of soda were knocked over, and the shelves were "messed up."

On cross-examination, Miller stated that, when he first noticed the broken window, the defendant was the only

person around the Walgreen store but that, by the time he had placed a second man (Donald Cricket¹) in the patrol wagon, five people were present.

Officer McDonald likewise identified the defendant as the man he had seen stepping down from the broken window of Walgreen's.

B. L. Little, a security agent for Walgreen's Drug Co. testified that there had been a number of burglaries in the vicinity of this particular store; that he was present at the store at 9:00 P.M. on the date in question and saw nothing unusual; and that when he left at 11:00 P.M. the window was intact. The witness did not return to the store until the following day, when he observed that the window had been broken and boarded.

The court granted defendant's attorney's motion at the close of the State's case and dismissed the charge of theft on the basis that there was no evidence that the three radios belonged to Walgreen's.

James Dickey, testifying on his own behalf, stated that he had been in the area of 1560 W. 63rd St., across the street from the store, on the date in question; that he noticed the broken window but did not know who broke it; and that there were 10 to 15 people present in the area.

On cross-examination the defendant stated he had not gone into the store and was not coming from inside the store when the police arrived.

I.

Defendant's sole contention on appeal is that the State failed to prove beyond a reasonable doubt that he had committed the offense of criminal damage to property.

¹/ The record before this court indicates Donald Cricket was a co-defendant not tried with defendant Dickey.

One commits the offense of criminal damage to property when he "Knowingly damages any property of another without his consent" (Ill. Rev. Stat. 1971, ch. 38, par. 21-1(a)) and, in the case at bar, the complaint charged the defendant with damaging a plate glass window belonging to the Walgreen Drug Co.

Defendant maintains the State failed to prove that he broke the window since, assuming the trial court found the testimony of the State's witnesses more credible than the defendant's, that evidence established that another person came through the broken window at the same time as defendant, and that other people were in the area, any of whom could have broken the window.

As authority for his position the defendant cites People v. Dougard (1959), 16 Ill. 2d 603, 158 N.E.2d 596 and People v. Flores (1961), 29 Ill. App. 2d 151, 172 N.E.2d 640. In both cases the defendants were arrested because of their presence near the scene of the crime, but it is significant to note that each offered a plausible explanation as to his presence near the scene of the crime. Further, in Dougard, a co-defendant admitted at trial that the appellant had played no part in the crime for which both were convicted and, in Flores, the defendant's presence near the scene of the crime constituted the only incriminating evidence. Accordingly, the reviewing court in each case reversed the defendant's conviction on the ground that the record left grave and substantial doubt of defendant's guilt.

In the instant case the record reveals that the window was intact at 11:00 P.M. and that, at 11:14 P.M., it was broken. The trial court, as is apparent from its finding of guilty, chose to believe the officer's testimony that defendant was the only person present at the scene at the time of their arrival; that he emerged from the store through the broken window; and that others did not arrive on the scene until the officers had arrested a second man who came from the store through the same broken window shortly after the defendant.

On the other hand, the defendant stated he did not enter the store, was not coming from the store when the police arrived, and that 10 to 15 people were present in the vicinity of the store.

The case at bar is thus distinguishable from those cited by defendant in that here there is sufficient circumstantial evidence in the record which, if believed by the trier of fact, would support defendant's conviction beyond a reasonable doubt. According to the testimony presented by the State, in the short span of a quarter-hour the store window had been broken and defendant was seen exiting the store through that broken window. In the absence of any direct evidence to the contrary, one can logically and reasonably conclude that the window was broken by the defendant, since, at that hour of the day, the normal mode of ingress to or egress from the store would not have been available.

Circumstantial evidence is legal evidence and is sufficient to sustain a conviction (People v. Marino (1970), 44 Ill. 2d 562, 580, 256 N.E.2d 770) so long as the proof of circumstances is of such a conclusive nature and tendency as to produce a reasonable and moral certainty that the accused committed the crime (People v. Lenker (1972), 6 Ill. App. 3d 335, 340, 285 N.E.2d 807). It is only where a conviction rests upon circumstantial evidence that raises little more than a suspicion against an accused and leaves a grave doubt of guilt, that a court of review is justified in disturbing the finding of the trier of fact, Id.

In the case at bar the testimony of the State's witnesses presented a set of circumstances from which the trial court could reasonably conclude that the defendant broke the drug store's window. A review of the entire record clearly indicates, in our opinion, proof of circumstances which conclusively establish that the defendant was guilty beyond a reasonable doubt. People v. Rucker (1972), 9 Ill. App. 3d 297, 292 N.E.2d 102.

The circumstantial evidence (broken window, Dickey and Cricket exiting the store at the same time through the broken window and the condition of the store inside) provided by the testimony of the State's three witnesses would have enabled the trial judge to infer beyond a reasonable doubt that: (1) either the defendant broke the window; or (2) the "second man" broke the window; or (3) both men broke the window. On inferences 1 or 3, defendant was properly convicted. On inference 2, defendant was still properly convicted because the same circumstantial evidence is sufficient to infer beyond a reasonable doubt that defendant "aided and abetted" the second man in breaking the window and is therefore accountable for the second man's act (People v. Bristow (1972), 8 Ill. App. 3d 805, 810, 291 N.E.2d 189). As stated by our supreme court in People v. Nowak (1970), 45 Ill. 2d 158, 169, 258 N.E. 2d 313, "It is also well settled that proof of a common design or purpose can be drawn from the circumstances surrounding the commission of the act."

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

HAYES, P.J., and STAMOS, J., concur.

(Publish abstract only.)

3D
20 I.A. 924



No. 57460

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
EDWARD HUFF,	)	MINOR K. WILSON,
Defendant-Appellant.	)	JUDGE PRESIDING.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Defendant Edward Huff was charged in a two-count indictment with rape (Ill. Rev. Stat. 1967, ch. 38, par. 11-1(a)) and indecent liberties with a child (Ill. Rev. Stat. 1967, ch. 38, par. 11-4(a-1)). After a bench trial, defendant was found guilty of rape¹ and sentenced to a term of ten to twenty years. On appeal the issues presented for review are:

- 1) Whether the complaining witness was competent to testify;
- 2) Whether the complainant's in-court identification of the defendant was properly admitted into evidence; and
- 3) Whether the State proved the defendant guilty beyond a reasonable doubt.

The complaining witness (hereinafter complainant) was an eight-year-old girl who testified that, on February 23, 1969, at approximately 7:30 P.M., she was playing with her younger sister and Reginald Samuels when a man approached them, asked the whereabouts of Too Too (a friend of the complainant), and directed Reginald to see if Too Too was at home; that the man grabbed her hand and took her behind a church; that the church was about two blocks away; that they did not walk on the sidewalk but went through a lighted grassy area; that, once they had gotten to the rear of the church, the man told her to pull down her pants but instead pulled them down himself, removed her

1/ The common law record indicates that a judgment of guilty was entered and sentence imposed only as to the rape charge.

shoes and coat, and placed the coat over her head; that he then laid on her and stuck his thing into her; that he stayed on her for a while; that, as he was leaving, she got up to put her clothes on but he instructed her to "lay back down"; that she did so until he was gone; that she then got up and two girls came from the church and took her to the church where a policeman came.

The complainant further stated that, during the ordeal, the man had hit her in the mouth causing her to bleed and indicated she was also bleeding from the vaginal area. The witness identified the defendant as the man who had attacked her by leaving the witness stand and touching the defendant. She testified that at the time of the crime the defendant wore a white jacket and green trousers and that she had never seen him before that evening.

On cross-examination the witness stated that, while the man was lying on top of her, she had screamed as loud as she could, but the man said "Shut up, bitch"; that, when the police first came, she had described the man to the police only as "kind of short"; that she had told the police at the hospital that she would be able to recognize the man if she saw him again; that the man they had brought to her hospital room was the man who had attacked her; that the man had no moustache; that the man brought to her hospital room then wore white pants; that a tall man had lived in the same apartment with her friend, Too Too, and the latter's mother, Mrs. Arlene Langford; and that she had looked at the man who approached her, her sister, and Reginald and he was not the tall man.

Reginald Samuels testified that he was eight years old; that, on Feb. 23, 1969 at about 7:30 P.M., he had been playing in the grass with the complainant and her younger sister, Sharon, when a man came over and told the witness and Sharon to "see about this girl named Too Too"; that the witness told Sharon

to see if Too Too was at home; that the complainant started following the man; that the witness then told his cousin, Ray Bishop, about the man, they contacted Mrs. Bates, the mother of complainant, and all began looking for the complainant.

Samuels stated he had seen the man whom he called "Eddie" in Mrs. Langford's apartment and had known him for approximately four months. He identified the defendant in court as "Eddie," the man whom he had seen with the complainant on Feb. 23, 1969, and stated that he had previously identified the defendant in a line-up conducted at the police station the day after the crime had been committed.

On cross-examination Reginald stated that at first he had thought that the man who went off with the complainant was Mrs. Langford's brother "Whitney" until the police told him at the time of the line-up that the man was "Eddie." In response to questions asked by the court the witness stated that, although he had thought that the man who had gone off with the complainant was Whitney, at the time of the trial he was sure that that man was Eddie because "policemens [sic] don't tell lies."

In an effort to clarify the apparent confusion in the witness's identification testimony, the following colloquy took place between the witness and the State's attorney:

"Q Reggie, did you know the name Whitney and Eddie? Did you know who those names belonged to? Did you think that his name was Whitney?

"A Yes, I really did.

"Q You are indicating that you thought the defendant's name was Whitney?

"A Right."

Responding to defense counsel's questions on recross-examination, Reginald stated that he had previously, on one occasion, seen Whitney in Mrs. Langford's apartment and that Whitney and Eddie did not resemble each other physically, since Eddie is short and Whitney is tall.

On redirect examination the witness testified that the tall man, Whitney, was not the man he had seen with the complainant and, on recross-examination, stated that the police did not tell him which person to identify in the line-up; that he picked out the defendant by himself since he had taken "a close look at him in the grass."

Merle Albertson, a detective with the Chicago Police Department, testified that, pursuant to information gathered while investigating the crime, he and three other officers went to 4025 S. Michigan Avenue, asked for Eddie Huff, and were told by the woman who answered the door that Eddie was not at home; that they placed the building under surveillance; that as he sat in the squad car he heard two shots, and saw one of the other officers, Officer Cox, chasing a man whom, he later discovered, was the defendant; and that the defendant was apprehended and placed under arrest at approximately 11:20 P.M. on the same evening of the crime.

Patrolman Thomas Kaminsky testified that at about 8:00 P.M. on February 23, 1969 he spoke to the complainant, who told him she had been playing with her sister in a playground when an unknown male negro had picked her up, told her he had a gun, stated that if she cried he would kill her, carried her to 4656 South Dearborn, removed her clothes, and had intercourse with her.

Dr. Rajai Dajani testified as to the injuries suffered by the complainant and as to the serious nature of her condition. He stated that, although he had not looked at the smear, the medical chart revealed that no sperm had been seen but that, since the complainant had been bleeding, the sperm could possibly have been washed away or masked by the blood.

Arlene Langford testified that she had known the defendant since 1960; that Whitney Langford was her brother; that she has a daughter called "Too Too"; that Reginald Samuels

had seen the defendant but knew neither the defendant nor her brother by name; that, on Feb. 23, 1969, the police came to her apartment and asked for her brother; that she told them where he lived; that some of the children present said that the witness's brother had raped the complainant while another said the defendant had done it; and that, when asked by the police, she gave them the defendant's address.

On cross-examination Mrs. Langford stated that she had "gone with" the defendant before he married but that they had "broken up" around April, 1968; that she was not angry when she discovered that the defendant had married another woman because she herself had then planned to be married to another man.

Officer Albert Cox testified to the same events surrounding the arrest as had Patrolman Kaminsky, adding that, as he stood near the back door of the building at 4025 S. Michigan, he heard a noise to the rear of the building, walked to that point, and saw a man jump from the window and run down the sidewalk. The officer justified the arrest as having been based upon the description of the suspect, the fact that Mrs. Huff had stalled the officers at the door, and the fact that the defendant had jumped from the window. He also stated that, at the time of the arrest, the defendant was wearing a dark jacket, light gray pants, shoes, and pajamas under the jacket and pants, and that there were no bloodstains on the clothing.

Emma Smith, testifying on behalf of the defense, stated that on Feb. 23, 1969 the defendant came to her apartment in the company of Whitney Langford at about 6:00 or 6:30 P.M.; that approximately one-half hour later the defendant left to go to the store and returned in about 20 to 25 minutes; that he left the apartment at 10:05 P.M.; and that at 7:30 P.M. he was in her apartment.

On cross-examination she stated that the defendant is married to her daughter; that on the evening of Feb. 23, 1969 he was wearing green pants, a green corduroy jacket, and black shoes; and that he had purchased the goods at the store with his own money.

Vivian Fisher, the defendant's sister-in-law, testified that she was present at her mother's (Emma Smith's) apartment on the evening of Feb. 23, 1969 for her younger sister's birthday party; the defendant and Whitney Langford arrived sometime after 6:10 P.M.; that defendant left at 7:00 P.M. to go to the store, returned 15 minutes later, and remained at the apartment for the rest of the evening.

On cross-examination the witness stated that she gave the defendant \$3.00 to buy liquor at the store; that Whitney Langford was wearing a black leather coat, a black hat, and dark pants; and that the defendant left the party with her at 10:30 P.M.

Whitney Langford testified that he met the defendant at about 5:45 A.M. on Feb. 23, 1969 and together they went to 44th and State Streets to eat and see their boss; that they proceeded to the South Water Market where they set up their stand on 14th and Union where they remained until they had sold all the produce; that they had "a little drink," received their day's pay, and drove their truck to 43rd and Prairie where it ran out of gas; that they left the truck and went to the party at Emma Smith's apartment; that they arrived there between 6:45 and 7:00 P.M. and remained there until 7:15 or 7:25 P.M. when they both left to go to the liquor store; that he left the defendant as the defendant went into the store, and did not see him again that night. The witness further testified that he had seen Reginald Samuels at his sister's (Arlene Langford's) apartment and at his fruit stand when the boy came with Too Too, the witness's niece.

On cross-examination the witness stated that defendant wore green pants and a corduroy jacket that evening; that it was Willie Solomon, the mother of defendant's mother-in-law, who gave defendant money and sent him to the store; that Reginald Samuels had seen the witness and defendant together prior to Feb. 23, 1969 when Reginald had come to the fruit stand; and that he had attended the line-up conducted at the police station.

Elaine Solomon testified that she too was at Emma Smith's apartment for a birthday party on Feb. 23, 1969; that the defendant arrived sometime between 6:15 and 6:55 P.M. in the company of Whitney Langford; that the defendant left the party 15 to 20 minutes later, and returned again after 10 to 20 minutes; and that, to her knowledge, he did not leave the party again.

On cross-examination she stated that Whitney Langford accompanied the defendant to the store and returned to the party with the defendant.

The trial court announced its finding of guilty and stated it was based upon a number of circumstances which corroborated the testimony given by the complainant and Reginald Samuels, to wit: 1) the man who approached the children knew Too Too; 2) Reginald knew both Eddie Huff and Whitney Langford from having seen them at Arlene Langford's apartment and at the fruit stand; 3) the defendant jumped from a second story window when the police came to his home, giving rise to a logical inference that he was conscious of his guilt; 4) the defendant was wearing his pajamas under his outer clothing when apprehended; 5) having believed the testimony of Whitney Langford, his testimony that they had left 4410 S. Calumet at 7:15 or 7:25 P.M. was consistent with the defendant's presence at 4525 S. Calumet (the scene of the crime) a short time later; 6) the defendant was away from the party long enough to have committed the crime and, to the extent that the alibi witnesses' testimony was not

consistent with this finding, the court did not believe they were telling the truth; and 7) the fact that Whitney Langford attended the line-up at the police station is significant since, if he had had any reason to fear the police, he would have stayed away from the police station on that occasion. The court further stated that, without a doubt, the crime had been committed and the only remaining problem was the identity of the offender.

I.

Defendant first contends that the testimony taken during the brief competency hearing failed to establish that the eight-year-old complainant was a competent witness and, accordingly, the trial court had abused its discretion in allowing her to testify.

It should be noted at the outset that, while defense counsel moved to quash the in-court identification by the witness, he made no objection at trial to the testimonial competency of the witness. While such an omission would ordinarily preclude appellate review of this issue (People v. Matthews (1959), 17 Ill. 2d 502, 506, 162 N.E.2d 381), the damaging nature of the testimony as well as its importance to the case compels this court to consider the matter. People v. Bridgeforth (1972), 51 Ill. 2d 52, 56, 281 N.E.2d 617.

The complainant, after taking the witness stand, was asked a few questions by the prosecutor². Then the prosecutor stated to the court that the witness had not been sworn and, in view of her tender years, suggested that the court inquire concerning the difference between telling the truth and telling a lie.

In response to the court's inquiries the complainant stated that she knew the difference between telling the truth

2/ The record indicates the State had asked questions concerning her age, school and grade, address, with whom she lived and whether she knew the difference between telling the truth and a lie, as well as certain preliminary questions concerning the incident in question.

and telling a lie and swore to tell the truth, but failed to respond when asked to tell the court what would happen if she did not tell the truth.

Every person 14 years of age or older is presumed competent to testify (People v. Sims (1969), 113 Ill. App. 2d 58, 61, 251 N.E.2d 795) but when a child under this age is called to testify the trial judge must conduct a preliminary inquiry

"[F]or the purpose of determining whether the witness is sufficiently mature (1) to receive correct impressions from his senses, (2) to recollect these impressions, (3) to understand questions and narrate answers intelligently, and (4) to appreciate the moral duty to tell the truth." (People v. Jackson (1971), 3 Ill. App. 3d 303, 308, 279 N.E.2d 8.)

The competency of a witness is determined by the trial judge, but, since the judge is vested with a certain degree of discretion and since his decision is based in part upon the demeanor of the witness, the decision will be reversed only where there has been an abuse of discretion or a manifest misapprehension of some legal principle. People v. Ballinger (1967), 36 Ill. 2d 620, 622, 225 N.E.2d 10; People v. Tappin (1963), 28 Ill. 2d 95, 98, 190 N.E.2d 806; Shannon v. Swanson (1904), 208 Ill. 52, 55, 69 N.E. 869.

In the case at bar the complainant knew the name of her school, her present address, and her former address. When asked to do so, she recalled in narrative form the events and conversation leading up to the crime. She stated on two occasions that she could distinguish truth from falsehood and that she intended to tell the truth. Although she did not respond when asked to detail the consequences of telling a lie, she replied affirmatively when asked if she could distinguish truth from falsehood and whether she intended to tell the truth. Based upon these factors the trial judge ruled that the witness was competent to testify. Tested by the standards of the Ballinger, Tappin, and Swanson cases and the record before the court, the trial judge did not abuse his discretion in so ruling.

We have considered the cases suggested by the defendant, People v. Sims, *supra*, and People v. Bryant (1970), 123 Ill. App. 2d 35, 259 N.E.2d 638. In Bryant the 12-year-old witness stated that she knew what it meant to tell the truth, failed to respond when asked what would happen if she did not tell the judge the truth, yet stated she would tell the truth. This court stated in dicta that the limited inquiry constituted an abuse of the trial court's discretion for the reasons set forth in Sims.

In our opinion the facts of Sims are clearly distinguishable from those of the instant case. There, when asked if he knew the consequences of failing to tell the truth, the witness said "No," while in the case at bar the witness responded "Yes" to a similar question. In both Sims and Bryant, this court's decision appeared to turn solely upon consideration of the last of the aforementioned standards, *i.e.*, the witness's ability to appreciate the moral duty to tell the truth. In neither case did the court consider the other three standards in reaching its decision³.

The supreme court in Tappin said (p. 97), "The age of the witness is not the controlling factor as to her competency, but rather the intelligence and understanding." In reviewing the cold record on appeal, we cannot disregard the fact that an eight-year-old girl was sitting in a witness chair in a large courtroom faced with the stark necessity, under such unfamiliar surroundings, of relating a traumatic, distasteful experience. Experience in trial courts has taught us that even adults find it difficult to be glib and sharp in responding to questions under such a setting. Here the trial judge patiently exhibited

3/ It is also significant to note, however, that in People v. Bridgeforth (1972), 51 Ill. 2d 52, 57, 281 N.E.2d 617, People v. Ballinger (1967), 36 Ill. 2d 620, 622-23, 225 N.E.2d 10, People v. Davis (1957), 10 Ill. 2d 430, 436-37, 140 N.E.2d 675, Shannon v. Swanson, *supra*, People v. Jackson, *supra*, at 308, and People v. Hall (1971), 1 Ill. App. 3d 949, 959-960, 275 N.E.2d 196, both this court and the supreme court, in affirming the trial court's finding of competency, recognized that, in determining the question of competency, the trial judge had the unique advantage of being able to observe the appearance and the conduct of the witness.

proper consideration for the young witness, and in so doing also considered, and did not violate, the due process rights of the defendant.

II.

Defendant contends that the trial court erred in denying his motion to suppress the complainant's in-court identification of the defendant. It is urged that a prior confrontation in the hospital between the defendant and the complainant was so unnecessarily suggestive and conducive to irreparable mistaken identification that it denied the defendant due process of law.

Officer Albert Cox testified as to the circumstances of the hospital confrontation, stating that he and three other officers apprehended the defendant on the same evening the offense was committed; that they took him to Ward 3 West of the Wyler Childrens Clinic at the University of Chicago Hospital, where the complainant was located; that they placed the defendant behind the door to the room so that the complainant could view him through the glass and wire mesh window, but that she was unable to identify him from that position; that the light in the corridor was dim, emanating from an office down the way while the complainant's room was brightly lit; that, with the nurse's permission, the defendant was brought into the room in the company of one white and one black officer, both dressed in civilian clothes; and that the complainant then rose up on one elbow and pointed to the defendant as he stood approximately six feet from her against the closed door⁴.

While the presentation of a suspect, standing alone, to the victim of a crime for purposes of identification has been observed to carry with it a dangerous degree of improper suggestion (People v. Gardner (1966), 35 Ill. 2d 564, 572, 221

4/ At this point the trial court noted that any testimony by the witness to the effect that the complainant had identified the defendant was improper as hearsay. The court stated that it must rely upon the complainant herself for any identification testimony and the officer could only testify as to the circumstances of the identification.

N.E.2d 232), there may be justifying circumstances which prevent such a viewing from being a denial of the suspect's right to due process (People v. Blumenshine (1969), 42 Ill. 2d 508, 512, 250 N.E.2d 152). Particularly, the supreme court has upheld the identification of the defendant in a hospital where it was uncertain that the victim would live. See also People v. Gersbacher (1970), 44 Ill. 2d 321, 323-325, 255 N.E.2d 429.

In the instant case Dr. Rajai Dajani, an instructor at the University of Chicago in the department of obstetrics and gynecology, testified that, on the evening of Feb. 23, 1969, the complainant had been brought to the emergency room of the hospital; that he examined her in the operating room at approximately 9:30 P.M.; and that she was in a serious condition necessitating surgery and remained in a serious condition for a few days afterward. The doctor testified that there was a possibility that whatever had perforated the vaginal area could likewise have perforated the large intestines, which would necessitate more extensive surgery and possibly make the complainant's condition more grave.

Defendant notes that in Stovall the identifying victim had been stabbed 11 times and was in critical condition. He argues that, since the complainant here was not in such great danger of death and since she was not the sole witness, the circumstances did not justify the show-up. Of course the circumstances must be considered as of the time of the presentation or viewing of the suspect by a victim, and the determination of reasonable necessity should not be based on the subsequent development that the victim did in fact recover.

In People v. Boyce (1969), 113 Ill. App. 2d 266, 252 N.E.2d 71, the two defendants were identified by one of their two victims in a show-up at the hospital. The victim's condition was not critical, but the wound in his leg was expected to keep him hospitalized for five months. This court stated that, due

to this anticipated five-month hospitalization period, the identification would have been delayed for that period of time, leading to the strong possibility that the victim would forget some or all of the aspects of the occurrence. Regardless of the fact that the other victim had identified the defendants in a line-up at the police station, this court concluded that the circumstances warranted the hospital show-up.

In People v. Owens (1970), 126 Ill. App. 2d 379, 261 N.E.2d 785 the victim suffered a shattered femur during the commission of the crime, eventually underwent surgery, and was hospitalized for over five weeks. Again this court stated that: "In view of these circumstances, we believe that the police conducted the only feasible identification procedure in taking defendant to [the victim's] room" (126 Ill. App. 2d at 385).

In the case at bar, at the time the officers brought the defendant to the hospital, the extent of the complainant's injuries was uncertain and subsequent examination revealed the serious nature of her condition. There was no testimony concerning the doctor's opinion at the time of his examination as to the length of time that the doctor anticipated she would be confined to the hospital. Thus the police could not be certain when she would be available to view a line-up at the police station. In light of these circumstances, we believe that the show-up at the hospital was proper.

Defendant urges that the hospital identification was further tainted by the fact that the complainant was unable to identify the defendant until he was brought into her room and she saw him handcuffed. Defendant would have this court infer that the complainant then identified the defendant solely because he was handcuffed and in the custody of police officers. This accusation amounts to mere speculation on defendant's part. It appears from Officer Cox' testimony that the police were

justified in bringing the defendant into the complainant's room, since the poor lighting in the corridor impaired the complainant's ability to clearly view the defendant.

Regardless of the pre-trial confrontation, there is sufficient evidence in the record to demonstrate the independent origin of the complainant's in-court identification. She had viewed the defendant when he first spoke to her and her sister and friend; she had walked with him for a distance of approximately two blocks through a lighted area before reaching the rear of the church; she described her attacker as a short, negro man wearing green pants and a white jacket; and she identified the defendant without hesitation as soon as he entered her hospital room. Although she did not remember that the defendant wore a moustache, this was but one factor to be considered in weighing the witness's credibility, and where, as here, the witness had adequate opportunity to observe her attacker, such a discrepancy is not sufficient to destroy the credibility of the identification (People v. Miller (1964), 30 Ill. 2d 110, 113, 195 N.E.2d 694; People v. Robinson (1972), 3 Ill. App. 3d 843, 850, 279 N.E.2d 526; People v. Calhoun (1971), 132 Ill. App. 2d 665, 668, 270 N.E.2d 450). Accordingly, the trial court did not err in denying defendant's motion to suppress the complainant's in-court identification.

III.

Defendant maintains that a number of factors demonstrate the existence of a reasonable doubt as to the defendant's guilt. He first argues that the identification evidence was weak in that the complainant was incompetent to testify, the hospital confrontation was improper, and her in-court identification had no independent origin. Since these contentions have been discussed above and resolved in favor of the State, further consideration is unnecessary.

Defendant further argues that Reginald Samuels,⁵ identification of the defendant both at the police station and in court is meaningless, since the police told him to identify the defendant as the guilty man even though he previously had believed Whitney Langford to be the offender. Although Reginald's testimony regarding the circumstances surrounding his identification of the defendant at the police station line-up was at first confusing, further examination of the witness revealed that he was confused only as to the name of the man whom he had seen with the complainant on Feb. 23, 1969, but not as to the physical appearance of that man. Reginald had seen the defendant and Whitney Langford together on a number of occasions. He stated that he could distinguish one from the other since one was tall and the other short, and stated that he had pointed out the defendant at the line-up without the aid of the police, since he had taken a close look at him when he had first approached the children on the evening of Feb. 23. Contrary to what defendant now urges, there is little reason to doubt the credibility and positive nature of Reginald's identification of the defendant.

Defendant notes that the police went to the defendant's home at the suggestion of Arlene Langford (sister of Whitney Langford) and suggests that she was personally motivated both by a desire to direct the police investigation away from her brother and by her harbored resentment for the defendant after his marriage to another woman. No such motives are apparent in Mrs. Langford's testimony. She stated that, when the police asked for her brother, she gave them his address, and gave them the defendant's address only after one of the children present

^{5/} Reginald Samuels was eight years old when he testified and after a preliminary examination by the court was sworn and permitted to testify.

had accused him of the crime. This theory was presented to the court as the trier of fact, and really goes to the credibility of the witness and the weight to be given to her testimony. Defendant's inferred motives as to Arlene Langford's testimony at this point in the proceedings do not raise a reasonable doubt of the defendant's guilt.

Defendant urges that Whitney Langford attended the police station line-up only to distract suspicion from himself, and this raised a reasonable doubt of defendant's guilt. In considering defendant's motion for a new trial, the court addressed itself to this particular contention and concluded that Whitney Langford was a simple, uncomplicated person and that the hypothesis suggested by defense counsel was too subtle and too clever for such a man. The court believed that Langford would not have risked the possibility of being identified as the offender if he was in fact guilty. A witness's credibility is a question for the trial court and, once again, this court cannot view the witness's demeanor and therefore is not in a position to speculate as to his motives. People v. Novotny (1968), 41 Ill. 2d 401, 412, 244 N.E.2d 182.

Finally defendant contends that the lack of physical evidence linking him to the crime raises a reasonable doubt of his guilt. Officer Cox testified that no blood stains were found on the clothing worn by the defendant at the time of his arrest. Detective Albertson testified that no search of defendant's home was conducted so as to find underwear that he might have been wearing at the time of the crime and that the officers made only a visual examination of his clothes. In this connection it must be observed the defendant was arrested at approximately 11:20 P.M. after he had been at home and had attempted to leave his home subsequent to the visit by the police.

In conclusion, since the positive identification of even one witness is sufficient to support a conviction (People v. Stringer (1972), 52 Ill. 2d 564, 569, 289 N.E.2d 631), the

positive identifications of two witnesses in the instant case, coupled with the entire record, supports the trial court's finding that the defendant was proved guilty beyond a reasonable doubt. As said by this court in People v. Pardue (1972), 6 Ill. App. 3d 430, 433, 286 N.E.2d 29:

"The trier of fact makes the determination of the witnesses' credibility and as we find that the evidence is not so unsatisfactory as to create a reasonable doubt of defendant's guilt that determination will not be disturbed. People v. Holt (1970), 124 Ill.App.2d 198, 201, 260 N.E.2d 291, 293."

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

HAYES, P.J., and LEIGHTON, J., concur.

(Publish abstract only.)

3D
201.A. 961

73-8

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

June 20, 1974 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, viz:

NO. 73-8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

JUN 20 1974

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
	)	Appeal from the 18th
v.	)	Judicial Circuit,
	)	Du Page County.
HUEY HOWARD a/k/a STAFFORD L.)	
WESTBROOKS, JR.)	
)	
Defendant-Appellant.)	

MR. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The defendant was the driver of a car ^{into} which three juvenile shop-lifters, fleeing from the security guards in a shopping center, entered. An all points call was put out and he was subsequently apprehended after being chased by a State trooper. He plead guilty to the offense of theft in excess of \$150 and upon a negotiated plea was granted probation for a period of four years, the first year to be served in the State prison farm at Vandalia.

The sole issue presented is whether his sentence of probation should be reduced.

The defendant was incarcerated for a total period of nine months and four days and was released from Vandalia on May 12, 1973. Counsel contends that the provisions of the Unified Code of Corrections relating to split-sentences is applicable to the defendant's sentence. Ill. Rev. Stat. ^{1973,} Ch. 38, Sec. 1005-6-3 (d).

We have decided this very same issue in People v. Hackbert (1973) 13 Ill.App.3d 427, 300 N.E.2d 777 at 779. We stated there

that the split-sentence was authorized when imposed and observed that if the provisions of the new Code were applied, the defendant would still have exactly the same period of probation to serve as he was given credit for the period of



incarceration toward his probation time. That is the case before us. Defendant was given four years probation, the first year thereof to be served at Vandalia, the defendant actually serving a little over nine months. We adhere to our ruling in People v. Hackbert and affirm the sentence of the trial court.

AFFIRMED.

P.J. MCRAN and J. SEIDENFELD Concur.

3D
20 I.A. 962

73-228

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

APR 30 1974

the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

APR 30 1974

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
CARL DOUGLAS PRATER,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court of the Nineteenth
Judicial Circuit, Lake
County, Illinois.

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

After a three count indictment charged defendant with one count of burglary and two counts of theft less than \$150, defendant, under a negotiated plea, pled guilty to one count of theft. The remaining two counts were dismissed and he was sentenced to a term of one to four years in the penitentiary.

Pending appeal, defendant's counsel filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 498, 87 S. Ct. 1396 (1967). In the motion, the public defender stated that, after a thorough reading of the record, it was his conclusion that defendant had been competently represented at trial; that in accordance with Rule 402 the court had fully and adequately advised him of the consequences of his plea of guilty; that the sentence imposed was in accordance with the negotiated plea and within the limits set forth in the criminal code; and that, in his opinion, this appeal is without merit.

While the public defender further stated that an argument might conceivably be made that the court, in its admonition, failed to establish a factual basis for the plea, we are satisfied, from our review of the record, that a factual basis for the plea of guilty was established.

This court, in its customary practice, mailed defendant a copy of the motion to withdraw and granted him leave to file any additional issues that he desired to have considered on appeal. In response, defendant filed a pro se petition in which he claimed that 1) he was not granted a speedy trial, and 2) he signed a statement after being coerced by the police.

The crime for which defendant stands convicted occurred on February 28, 1972; he was indicted on May 2, and arraigned on May 18, 1972. His plea of guilty was entered on February 26, 1973, more than 120 days from the date he was taken into custody. On that basis, it would first appear that defendant was not granted a speedy trial. (Ill. Rev. Stat. 1971, ch. 38, §103-5(a).) However, defendant has failed to acknowledge that, when arraigned, he was set free on his own personal recognizance. The record reveals no demand for trial (Ill. Rev. Stat. 1971, ch. 38, §103-5(b)) and, consequently, he cannot claim denial of a speedy trial under the statute. Further, a plea of guilty waives any such right. People v. Pritchett, 29 Ill. 2d 407 (1963); People v. Lybarger, 22 Ill. 2d 170 (1961).

Defendant seeks reversal on the grounds that, on the day following his arrest, he was coerced into giving a statement. It is not alleged that his plea of guilty was coerced or that it was entered as a result of the year-old statement. We have already found that the plea of guilty was properly entered by the trial court. Even if, as alleged, the statement was coerced, that would not be a jurisdictional defect and a plea of guilty waives all nonjurisdictional defects. People v. Dunn, 52 Ill. 2d 400, 402 (1972); People v. Brown, 41 Ill. 2d 503, 505 (1969).

After the required total review of the record, we conclude that this appeal lacks merit. The motion to withdraw is therefore allowed and the judgment of the trial court is affirmed.

Motion to withdraw allowed; judgment affirmed.

GUILD, P.J. and SEIDENFELD, J., concur.

3D
20 I.A. 969

73-227

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice

Honorable GLENN K. SEIDENFELD, Justice

Honorable L. L. RECHENMACHER, Justice

LOREN J. STROTZ , Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

June 26, 1974 the Opinion of the Court was filed in

the Clerk's office of said Court, in the words and figures
following, viz:

FILED

JUN 26 1974

No. 73-227

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Nineteenth
v.	)	Judicial Circuit, Lake
	)	County, Illinois.
F. ROBERT PEACOCK,)	
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, F. Robert Peacock, was found guilty of burglary after a bench trial and sentenced to serve three years probation. He appeals, contending only that the State failed to prove him guilty beyond a reasonable doubt.

Defendant and Charles M. Krulih, were indicted for the January 11, 1972, burglary of the Jerry McLain residence in Gurnee. James McLain, a son, testified that he arrived at his parents' home and observed a man walking down the stairs from the upper bedrooms. When the man was halfway down the stairs McLain looked at him from a distance of about ten feet. The man looked at McLain and ran back upstairs. The witness testified that he saw the man's face for approximately a few seconds under lighting that enabled him to see the face clearly. McLain then ran out the back door; and as he stopped for a few seconds the man he had seen on the stairway ran out the back door and was again observed, this time from a distance of about six feet.

As James McLain was running to a neighbor's house he saw another man jumping out the upstairs window of the McLain residence. Although he observed him from a distance of about ten feet he did not see the man's face. On direct examination McLain testified that the man was wearing a long brown corduroy jacket, that he was approximately 5'6" or 7" and appeared to be about 40 years old; and that at the McHenry police station he observed the defendant wearing the same brown coat he had seen earlier. On cross-examination McLain said he may have described it to the Gurnee police as a long gray coat. The witness also testified that when he saw Krulih at the McHenry police station he recognized him as the man he had seen face to face on the stairs, and that at the station, he was wearing the same light colored coat, approximately waist length, he had seen earlier. McLain testified that he later observed that panes were missing from a jalousie window about seven feet from the ground and opening into a first floor bedroom. In the bedroom a drawer had been emptied and its contents strewn onto the bed.

McLain also testified that as he was driving down the road, prior to entering the house, he had seen, in a momentary glance, a car parked on the grass next to his parents' home. He described the car to the Gurnee police as a white 1967 or 1968 Pontiac G.T.O.

At approximately 1:52 P.M. on January 11th, at the intersection of Routes 31 and 120 in McHenry, Illinois, an officer of the City of McHenry police department stopped a 1966 white Pontiac Tempest which was similar in appearance to the one described by McLain. The two men in the car, Krulih and the defendant, voluntarily went to the McHenry police station. The officer testified that Krulih was wearing a charcoal gray coat and defendant a long brown corduroy coat.

In response to a call from the McHenry police, Chief Anderson of Gurnee, James McLain and his mother went to the McHenry station where James identified Krulih in a showup as the man he had seen on the stairs. He could not identify defendant as the other man he had seen jumping from the window, but testified that he recognized the coat, the man's size and his general appearance as the same as that of the second man he had seen at the house. At the City of McHenry police station, he observed the same car he had seen parked next door to his parents' home.

Defendant, testifying in his own behalf, stated that he was 41 years old; that on January 11, 1972, he was in the company of Charles Krulih the entire time until his arrest; that he went with Krulih on what he was told was a business trip to Libertyville and then to Wilmot, Wisconsin, where Krulih was to have a date with a girl at the ski lodge. The girl, Krulih, defendant, and another girl had lunch in Richmond. From there defendant and Krulih left in Krulih's car and were then stopped near McHenry. The defendant did not know the names of the girls and they were not called as witnesses.

Defendant testified that James McLain came to the door of the office in the McHenry police station where defendant and Krulih were seated talking with Chief Anderson and the McHenry officer; that he walked out shaking his head "in a side-to-side fashion" and said he didn't recognize either of them; that then Chief Anderson grabbed McLain by the shoulder and whispered to him, "something about this guy sitting down has got a record as long as your arm. We want you to identify him"; that Chief Anderson then brought McLain back to the room manually and stood there with his hands on his shoulder and then Krulih was identified. This was in conflict with the testimony of James McLain who stated on cross-examination that Chief Anderson had only told

him to be certain of his identification. He said he did have a conversation with Chief Anderson on the way out to McHenry in which the Chief mentioned that one of the men they had picked up had a record and that he may have said that again at the station but that he did not point out any individual.

Defendant argues that he was convicted of participation in the burglary solely on the circumstance that he was with Krulih, who was identified as one of the burglars, for most of the day in question. He urges that the identification of Krulih was based upon very limited opportunity to observe and was vague and unconvincing; that the "showup" in which Krulih was identified was impermissibly suggestive; that the defendant was not identified; and that the identification of the car was impeached because of a limited view and the fact that the model and year were erroneously stated. Defendant argues that the case against him is based wholly on circumstantial evidence and does not so thoroughly establish his guilt as to exclude every reasonable hypotheses of innocence.

We cannot agree. The identification of Krulih was positive and based on a sufficient opportunity to observe. The slight discrepancies in the description of articles of clothing were not sufficient to destroy the identification testimony but went to the issue of credibility. The weight of the testimony was for the court as the trier of the fact. See People v. Chapman (1961), 22 Ill.2d 521, 524-5; People v. Hill (Abst. 1972), 3 Ill.App. 3d 694.

While McLain could not identify defendant by his face, he did correctly describe physical features, age, and substantially the garment defendant was wearing. Identification need not be positive to support a conviction. Its weight is a question for the trier of facts to be determined in connection with other circumstances of the case. People v. Oswald (1963), 26 Ill.2d 567, 570-571.

The subsequent identification of Krulih by McLain at the Mc-Henry police station was not vitiated because a showup rather than a lineup was used since the totality of the circumstances do not indicate that the identification was so unnecessarily suggestive and conducive to irreparable mistaken identification as to amount to a denial of due process. (See People v. Simmons (1970), 130 Ill.App.2d 614, 617.) And even if it could be said that there was an improper confrontation there was no substantial likelihood of mis-identification since there was an independent basis for identification of Krulih. See People v. Smith (1974), 18 Ill. App.3d 859 , 310 N.E.2d 734, 738-9; People v. Cassman (Abst. 1972), 7 Ill.App.3d 786.

People v. Gardner (1966), 35 Ill.2d 564, 573, cited by defendant, is distinguishable on its facts. In Gardner, there was a basic conflict in the evidence between weak identification testimony and a strongly corroborated alibi (see page 571). Here, the identifying witness had sufficient opportunity to identify Krulih at the scene of the burglary; there was an independent origin for the positive subsequent identification of Krulih; and there were the strong additional circumstances that defendant was with Krulih the entire day, was stopped in a car similar in description to one observed at the scene of the burglary, and that defendant's build, age and clothing were similar to the second man observed at the burglary scene in the McLain home. The court was not required to give credence to defendant's alibi testimony particularly since the co-defendant refuted the essential details of why they were in Wisconsin and the girls who could have corroborated a portion of the defendant's story were not called as witnesses. See People v. Hammond (1970), 45 Ill.2d 269, 278.

On the whole record we are unable to conclude that the evidence is so improbable or unsatisfactory as to leave a reasonable

doubt of defendant's guilt, and therefore we cannot disturb the finding of the trial judge. People v. Reaves (1962), 24 Ill.2d 380, 382; People v. Huff (1963), 29 Ill.2d 315, 320.

We, therefore, affirm the judgment below.

Affirmed.

MORAN, THOMAS J., P.J. and RECHENMACHER, J. concur.

72-196

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

July 1, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

No. 72-196

FILED

JUL 1 - 1974

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LOREN J. STOLTZ, Clerk pro tem
Appellate Court, 2nd District

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court of the Nineteenth
v.	)	Judicial Circuit,
	)	McHenry County,
LARRY CAMPBELL,	)	Illinois.
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant Larry Campbell was convicted of burglary, and found not guilty of theft, after a jury trial. Defendant was sentenced to 2-5 years in the penitentiary. He appeals, contending that he was not proven guilty beyond a reasonable doubt and that he was improperly sentenced.

The offense charged an unlawful entry into Horn's Shell Service Station in Harvard on February 13, 1971, with the intent to commit a theft. Mrs. Evelyn Sweatman and Mrs. Jeanette O'Brien testified for the State that they were in the Sweatman home on the night of February 12th and the early morning hours of February 13th, 1971. The home is located on the opposite side of the street two or three houses from the service station. Both women testified that they saw a four-door car with a dark bottom and light top stop in front of the house at 11:00 P.M. on February 12th. The car faced in the direction of the service station where it remained for about ten minutes. Two male passengers were in

the front seat. Approximately 12:15 A.M. that same night they saw the same car return and park in front of the Sweatman house. This time the man sitting on the passenger side, which was closest to the Sweatman residence, got out and went across the street between the houses. Mrs. O'Brien saw him turn right towards the gas station, then return about five minutes later. She described the man as wearing dark clothes and a short nylon jacket. He returned to the passenger's side of the car and the car drove slowly away. Neither of the women could identify the occupants. Although the women could not identify the make of the car, they were sure it was the same car because of its general appearance and the sound the engine and muffler made.

Both women testified that at approximately 2:00 A.M. the same car returned to the front of the Sweatman residence; that again the man on the passenger side got out, crossed the street, walked between the houses, and at the rear of the houses turned in the direction of Horn's Shell Service Station. The man remaining in the car lit and smoked a cigarette. The lights and engine were off as they had been previously when the car was parked. The witnesses, who were looking out from their darkened house, then called the Harvard police.

Sergeant Gibson of the Harvard Police responded to the call on foot from the police station located a half block away. He testified that it was very cold, 2-3 degrees below zero, and that there was snow on the ground. As he approached the car, the man seated behind the steering wheel ducked down. The officer directed his flashlight into the front seat and saw a person lying down, told him to sit up and asked for identification. The man was identified as the defendant, Larry Campbell. Sergeant Gibson ordered the defendant out of the car and searched him. When defendant was asked what he was doing, he replied that he was sleeping. During the course of the search Sergeant Gibson testified that the defendant was attempting to look in the direction of the service station.

Just as the search was ending, Sergeant Gibson saw a person coming towards the car from between the houses across the street. This man was carrying a cigar box and tire iron or iron rod. When Gibson shined his flashlight on the person and ordered him to halt, he ran off. At this point defendant was arrested and taken to the police station.

Approximately one-half hour later Sergeant Gibson arrested Larry Savage, whom he identified as the person who ran away from him earlier. When arrested, Savage had torn pants and a cut on his leg. He also had \$264.15 on his person, \$9.15 of which was in change.

Sergeant Gibson questioned the defendant again at the police station and when he told defendant that he did not believe his story that he had been sleeping, defendant changed his story and explained that he and Savage were in town because Savage wanted to visit a girlfriend to get sex.

The owners of Horn's Shell Service Station testified that early in the morning of February 13, 1971, they were called by police and discovered their station had been burglarized. A window in the gas station was broken, the cash register drawer was found on the floor and a cigar box containing the money was missing.

An expert from the Illinois Bureau of Identification testified that glass particles taken from the trousers worn by Larry Savage had the same refractive index as fragments of glass from the broken window of the service station. Another expert testified that the cloth fibers removed from glass fragments of the broken window of the gas station matched the fibers in the trousers worn by Savage at the time of his arrest.

The car involved was a four-door 1961 white-over-maroon Ford, registered in the name of Mrs. Savage. An empty can of beer was found in the car.

The defendant testified that after Savage, his wife and child had eaten at defendant's house, defendant and Savage went out to shoot pool and drink beer; that it got late and defendant slept part of the time while Savage drove around; that defendant drove when they arrived in Harvard because Savage had no license and because Savage said he wanted to see a girl and had to look for streets. Defendant claimed he parked just once in front of the Sweatman house, which was just before he was arrested, but that he was with Savage all the time that night prior to his arrest. Defendant said that he did not discuss breaking into the service station with Savage and that he did not advise or assist Savage to break in. He explained that he ducked when Gibson approached because he had a can of beer in his hand in the car.

On this record there can be no reasonable doubt that the burglary took place and that Savage committed it. Defendant's contention is that the proof was insufficient to convict him under principles of accountability. (Ill.Rev.Stat. 1971, ch. 38, par. 5-1, 5-2.) Under the statute, the State is required to prove beyond a reasonable doubt that defendant solicited, aided, abetted, agreed or attempted to aid another person in the planning or commission of the offense, that defendant's participation took place either before or during the commission of the offense, and that it was with the concurrent, specific intent to promote or facilitate the commission of the offense. People v. Tillman (1971), 130 Ill. App.2d 743, 749-750.

Defendant relies principally on People v. Adams (1972), 8 Ill. App.3d 62, as compelling authority for reversal and has tabulated what he considers similar factors in both cases. We find, however, also significant distinguishing facts in the cases. In Adams, the court was uncertain of the concurrence in time of the burglary and the defendants' presence at the scene, while here defendant was

arrested when Savage was seen returning to the car with a cigar box after the burglary. Unlike Adams, in this case Savage's car with two occupants was seen under suspicious circumstances in the vicinity of the crime twice before the burglary and defendant admitted that he was with Savage the entire night. Defendant's furtive conduct not only in ducking down but in attempting to look towards the service station during his search, and Savage's return to the car with a tire iron and cigar box in his hand also contradict defendant's theory that he was not knowledgeable of the burglary. These facts impeach significant points of defendant's testimony at the trial and sufficiently distinguish this case from Adams. We therefore conclude that the record supports the determination of the jury and the court's judgment that defendant's accountability was proven beyond a reasonable doubt. (People v. Knell (Abst. 1970), 129 Ill.App.2d 9.) The judgment of conviction is affirmed.

In his brief filed in this court the defendant argued alternatively that the absence of a report of proceedings at the hearing in aggravation and mitigation required a remand for a new sentencing hearing in which the Unified Code of Corrections would be applicable. The State averring its inability to locate the court reporter, or the transcript of the aggravation and mitigation hearing, conceded that the defendant's 2-5 year sentence was not in accordance with the Unified Code of Corrections and joined in the recommendation that defendant be resentenced. On oral argument, however, the defendant's counsel advised the court that it is defendant's desire and to the defendant's advantage and best interests that this issue be withdrawn on appeal, even though meritorious, since there is the possibility of a more severe sentence on remand based upon conduct of the defendant occurring after the original sentencing. (Ill.Rev.Stat. 1973, ch. 38, par. 1005-5-4.)

We have taken the defendant's written motion to this effect with the case and now order that the motion be granted.

For the reasons stated the judgment below is therefore affirmed.

Affirmed.

GUILD, J. and RECHENMACHER, J. concur.

74-87

STATE OF ILLINOIS

People vs. Walter Charles York



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present—

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

+ HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

July 11, 1974

the Opinion of the

Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Rock Island County
)	_____
vs.)	
	)	Honorable
WALTER CHARLES YORK,	)	Conway L. Spanton
	)	Presiding Judge.
Defendant-Appellant.)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Rock Island County finding defendant Walter Charles York guilty of armed robbery, pursuant to which defendant York was sentenced to a term of not less than twenty (20) nor more than sixty (60) years in the Illinois State Penitentiary. The office of the State Appellate Defender was appointed to represent defendant on appeal in this Court. The State Appellate Defender has now moved for leave to withdraw as counsel on appeal for appellant in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender states that an examination of the record by counsel (accompanied by a brief in support of counsel's conclusion) has forced counsel to the conclusion that an appeal would be wholly frivolous and could not possibly be successful.

Defendant Walter York was indicted for an armed robbery which resulted in the taking of \$3,000 from one Willis Retzloff. The case proceeded to trial but following the first witness (the arresting officer, who testified for the State) York tendered a written plea of guilty and waiver of jury trial. The defendant was admonished by the court in accordance with Supreme Court Rule 402 before the acceptance of his plea of guilty. The court explained the nature of the charge

and defendant responded that he understood. After defendant had been informed of his right to confront witnesses, his right against self-incrimination, and his right to a jury trial, defendant advised the court that he understood those rights and was waiving them. The court then advised York of the possible minimum and maximum sentence which might be imposed and defendant advised the court that he understood all of those rights and waived them. Defendant also replied that he was aware that Armed Robbery was a Class 1 felony with a minimum term of four years and a maximum of any number of years. It was then explained to defendant that probation was not available. The court also established that the plea was completely voluntary and that there had been no plea negotiations.

While a factual basis was not set forth during the plea proceedings, it appears in several other instances in the record. During the partial trial, the arresting officer testified that he had apprehended York immediately outside the Retzloff residence and that defendant was then in possession of two guns and the proceeds of the robbery. The factual basis was also set out in detail in the presentence report, and the court indicated that he had examined the presentence and that the testimony of the police officers at the time furnished a sufficient factual basis. The omission to set forth the factual basis during the plea proceedings is not reversible error if such factual basis appears elsewhere in the record and if the court was cognizant of the factual basis. (People v. Price, 9 Ill. App. 3d 693, 292 N.E. 2d 752; People v. Bolen, 8 Ill. App. 3d 688, 290 N.E. 2d 413).

At the hearing in aggravation and mitigation, the presentence report was introduced in evidence and also three certified copies of prior felony convictions was introduced. At the time of the commission of the offense under consideration in this cause, York was on parole from an Iowa sentence for attempted murder of an Iowa State Highway Patrolman. It appears also that, from defendant's extensive juvenile record, which commenced in 1967, until the date of the offense under consideration, defendant York had been almost continuously incarcerated in prison or jail. The witness who testified on behalf of defendant, Minister Gerald, testified that York had no ability to cope with value judgments, had negative personal

relationships, and that he needed psychiatric help and employment which would provide him with more income than a menial wage. York also testified in his own behalf that at the time of the offense he was 28 years old and was working as a cook at the Holiday Inn earning \$2.00 per hour. He also stated that he was sorry he committed the crime. He indicated that despite threats which were made by him, he had no intention to harm any member of the Retzloff family; that the gun fired in the house by accident when he stumbled and that defendant stated he wished to be rehabilitated and learn something so that he "wouldn't have to steal."

The court explained that leniency was not indicated in the case and imposed a sentence of not less than twenty years nor more than sixty years. The court explained that the reason for the larger sentence was because of the nature of the crime and defendant York's extensive previous criminal record. It appears, therefore, from the record that this sentence was not excessive and did not constitute an abuse of the trial court's discretion in view of the facts and precedents. (People v. Hayes, 52 Ill. 2d 170, 287 N.E. 2d 465).

On the basis of the record in this cause, therefore, we concur in counsel's contention that there is no basis for maintaining an appeal in this cause and that continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Rock Island County is, accordingly, affirmed, and for the reasons stated, the motion of the State Appellate Defender to withdraw as counsel for defendant, Walter Charles York is allowed.

Judgment Affirmed and
Withdrawal Motion Allowed.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HAROLD F. TRAPP, _____ Presiding Judge

HONORABLE JAMES C. CRAVEN, _____ Judge

HONORABLE LELAND SIMKINS, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 10th day
of July A. D. 19 74, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

THE

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11850

Agenda 73-87

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from
	)	Circuit Court
LEO FRAZIER,	)	Champaign County
)	
Defendant-Appellant)	

Mr. JUSTICE CRAVEN delivered the opinion of the court:

Defendant was charged with armed robbery of the Holiday Inn located in Champaign, Illinois which occurred on September 2, 1971. He was found guilty in a jury trial. The trial court entered judgment on the verdict and sentenced defendant to an indeterminate term of 5 to 10 years. Defendant appeals.

Defendant was 17 years old when he was arrested, and the disposition of this case has awaited the outcome of the supreme court decision in People v. Ellis, 57 Ill.2d 127, N.E.2d . The court in Ellis held section 2-7(1) of the Juvenile Court Act (Ill.Rev.Stat.1971, ch. 37, ¶ 702-7(1)) unconstitutional; but found that the eradication of the invalid

clause from the statute made that provision inapplicable to either males or females who were not under 17 years of age. Therefore, in this case, as in Ellis, "The failure to consider defendant eligible for treatment as a minor" under the provisions of the Juvenile Court Act did not deprive him of equal protection of the law.

On appeal, the defendant urges that the police did not have probable cause to arrest him, and consequently the lineup identification of him and the in-court identification should have been suppressed. Secondly, he submits that he was denied due process because the State allegedly concealed a police report that contained exculpatory evidence.

On September 2, 1971, around 3:45 a.m., two young black males entered a Holiday Inn located in Champaign, Illinois. They confronted Mr. Scott Houser, the night clerk, who was in the process of clearing the cash register. They demanded that he give them all the money out of the cash register, which he did. Both suspects were armed, wore wigs and hats. One of the individuals was approximately 5'9" tall and wore a "tennis type" cap with distinctive color panels.

Officer John Schweighart was the investigating officer at the scene of the armed robbery. He showed Mr. Houser various photographs of suspects and took the victim's initial description of the assailants. Mr. Houser was not able to make any positive identification from any of the photographs, although

he did pick out a photo of defendant and another individual as "look-alikes", but he later rejected them in favor of another pair of photographs.

A few days later, officer Schweighart observed the defendant in the lobby of the Champaign City Police Department. The defendant fit the description of one of the armed robbers of the Champaign Holiday Inn. He was also wearing a multi-colored hat which the officer characterized as a golf hat containing various colored panels. At that time, Officer Schweighart arrested the defendant acting upon the description given him by Mr. Houser and other information he had in his possession. Immediately thereafter, a lineup was conducted.

At the lineup, Mr. Houser made a positive visual identification of defendant as being the individual that had robbed him. Houser picked defendant out of a lineup of seven men. He was also able to make an affirmative oral identification of defendant's voice and he identified defendant's hat as being one very much like the multi-colored hat that was worn during the robbery. Defendant was subsequently indicted for armed robbery.

Prior to trial, counsel for defendant filed a motion to suppress the in-court identification of defendant by all individuals who viewed the lineup that took place on September 5, 1971. Defendant's motion was predicated upon the assertion that his arrest had been effected without probable cause. After a hearing on the motion, it was denied by the trial court.

On appeal, defendant argues that the trial court's finding that the authorities had probable cause to arrest him was erroneous.

Probable cause for an arrest exists where the facts and circumstances within the arresting officer's knowledge, and of which he had reasonable trustworthy information, were sufficient in themselves to warrant a prudent man in believing that suspect has committed or was committing an offense. (Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142.) While it is not necessary that the arresting officer have evidence which would satisfy a fact finder of guilt beyond a reasonable doubt, he clearly must be acting upon something more than "mere suspicion." People v. Wright, 56 Ill.2d 523, 309 N.E.2d 537.

The issue of probable cause for an arrest sometimes depends, at least in part, upon the reliability of information which the officer making the arrest had obtained from someone else. The reliability of this information depends upon the facts of the particular case. (Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419.) The test that a reviewing court should resort to in determining whether the information is sufficient to constitute probable cause is one of reasonableness. McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62.

Applying these standards to this case, the information possessed by officer Schweighart consisted of: (1) a detailed physical description of the suspect given by the victim of the armed robbery immediately after the crime had occurred; (2) the

knowledge that the suspect had worn a distinctively multi-colored hat at the time of the armed robbery; (3) the knowledge that the victim had tentatively picked defendant's picture out as a probable suspect and then rejected it; (4) the fact that defendant who matched the general description of the armed robbery appeared at the Champaign City Police Department a few days later wearing a distinctively multi-colored cap not unlike the one the armed robber had worn the night of the robbery. This information constituted probable cause to arrest. We find that officer Schweighart acted reasonably under the circumstances.

Lastly, defendant argues that the State improperly concealed certain exculpatory evidence from him which resulted in denial of due process. At the hearing on the pretrial motion to suppress, defendant did not have in his possession a police report which noted that Mr. Houser, the victim, had initially picked out defendant's picture as being a look-alike of one of the armed robbers and that he later rejected that choice. Accordingly, defendant argues that this demonstrates that officer Schweighart did not possess sufficient and proper information amounting to probable cause to enable him to arrest defendant.

We agree it was error for the State not to comply with discovery in Supreme Court Rule 412(c) (Ill.Rev.Stat.1971, ch. 110A, ¶ 412(c)). However, we find it was harmless error beyond a reasonable doubt. The record reveals that even in light of Mr. Houser's rejection of defendant's photograph, officer

Schweighart had sufficient information to make a proper arrest. The police report in issue noted "Out of the picks he first picked Leo Frazier and B. W. Fairman, but could not think of what they would look like with a wig. He then decided that neither was them. He then picked Ernest Lockett and Philip Friend as look alike but made no positive I.D." This in and of itself would not vitiate the probable cause that Schweighart had for arresting defendant.

The judgment of conviction is affirmed.

AFFIRMED.

TRAPP, P.J., and SIMKINS, J., concur.

No. 71-83

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
JUN 27 1974

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	St. Clair County.
vs.)	
)	
ARNEDA GILMORE,	)	Honorable William P. Fleming,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant was convicted by a jury of the offense of aggravated battery. She was sentenced on March 15, 1971 to a two year period of probation with the first sixty days to be spent in county jail.

The defendant had previously been convicted in an East St. Louis municipal court of violating a city disorderly conduct ordinance. The state charge of aggravated battery and the city charge of disorderly conduct each arose from the same incident, and it appears that the same acts of the defendant constitute both alleged offenses.

Prior to trial the defense counsel moved to dismiss the aggravated battery charge on the ground of prior jeopardy. The motion was denied, and the defendant asserts that the ruling was error. We agree.

It had previously been held that dual prosecutions for the same act under a municipal ordinance and a state statute did not constitute double jeopardy. City of Chicago v. Berg, 48 Ill.App.2d 251, 199 N.E.2d 49; People v. Behymer, 48 Ill.App.2d 218, 198 N.E.2d 729. The United States Supreme Court decided in 1970, however, that successive prosecutions for the same offense by a state and a municipality are prohibited by the fifth amendment to the federal constitution. Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435. Our Supreme Court subsequently recognized the same principle in People v. Allison, 46 Ill.2d 147, 263 N.E.2d 80.

In Allison the defendant had been convicted of disorderly conduct in violation of a municipal ordinance. The Supreme Court held that the conviction was a bar to a subsequent state prosecution for disorderly conduct.

~~In People v. King, 1 Ill.App.3d 757, 275 N.E.2d 213 the defendant was~~

charged with indecent conduct in violation of a municipal ordinance. Evidence was heard and thus jeopardy attached in the municipal court, but the cause was dismissed before a verdict was rendered. The defendant was subsequently indicted for the state offense of deviate sexual assault. A defense motion to bar prosecution on the grounds of double jeopardy was denied even though the same alleged conduct was the basis of both the municipal and the state charges, and the defendant was convicted. The appellate court, citing Allison, reversed the conviction holding that the defendant had been placed twice in jeopardy.

For the foregoing reasons we hold that a defendant cannot be twice placed in jeopardy for offenses based on the same conduct even though one of the charges is based upon a municipal ordinance. The aggravated battery conviction in the instant case violated the defendant's rights under the Illinois and Federal constitutions. Ill. Const., Art. II, sec. 10; U.S. Const., amendment V.

Judgment reversed.

Crebs, J., not participating.

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